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No. 11426

IN THE

11. 2453

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a Corporation,

Appellant,

vs.

MARTIN R. DeVANEY,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

NOV - 2 1946

PAUL P. O'BRIEN,

CLERK

No. 11426

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UNION PACIFIC RAILROAD COMPANY,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

E. E. BENNETT
EDWARD C. RENWICK
MALCOLM DAVIS

422 West Sixth Street
Los Angeles 14, Calif.

For Appellee:

DESSER, RAU & CHRISTENSEN
325 West Eighth Street
Los Angeles 14, Calif. [1*]

In the District Court of the United States for the
Southern District of California

Central Division

No. 4876-PH

MARTIN R. DeVANEY,

Plaintiff,

vs.

UNION PACIFIC RAILROAD,

Defendant.

COMPLAINT FOR PERSONAL INJURIES

Plaintiff Alleges That:

I.

Plaintiff is now and at all times mentioned herein was a resident of the County of San Bernardino, State of California.

II.

Defendant is now and at all times mentioned herein was a corporation organized and existing for and by virtue of the laws of the State of Utah and authorized to do and engage in doing business in the State of California.

III.

At all times herein mentioned defendant was the owner of a *certain* railroad known as the Union Pacific Railroad, together with the track, rolling stock and other appurtenances belonging thereto and was a common carrier of passengers and goods for hire between various points within the State of California [2] and various points in certain other states of the United States of America where its railroad runs.

IV.

At all times herein mentioned plaintiff was employed by defendant as a brakeman in such interstate commerce.

V.

On or about January 21, 1944, while plaintiff was engaged in the performance of his duties as a brakeman in and upon a freight train being then operated by the defendant, at or near one of its stations, commonly known as the El Cajon Station, plaintiff was injured through the defendant's negligence and carelessness in that the defendant fastened and secured a tractor to the floor of one of the flat cars in said freight trains with wires that were frayed, weather-beaten, dark and coated so as to make them invisible, which wires were so improperly, negligently and carelessly fastened around said tractor that they became entangled in the plaintiff's clothing as he was working in and around said freight car, causing him to fall and thereby sustain great bodily injuries, notice of which was given to the defendant at once.

VI.

At the aforesaid time and place the defendant, in violation of the Federal Safety Appliance laws, used frayed, weather-beaten, dark and coated wires to fasten a tractor to a flat car in the freight train on which the plaintiff was working as a brakeman, and that by reason of the defendant's failure to provide a reasonably safe and proper place for the plaintiff to work the plaintiff was caused to and did fall from said train and thereby suffered great bodily injuries.

VII.

In said accident, and as a direct and proximate result of the defendant's negligence and carelessness, as aforesaid, [3] plaintiff sustained injuries to his person. The muscles, tissue walls and membrane in plaintiff's abdomen were severely torn, lacerated, weakened and ruptured, and

he was otherwise injured externally and internally. He has suffered and will continue to suffer displacement and dislocation of said internal organs and he became weak, sore and lame and so remained from the date of the accident to now.

Since said injuries plaintiff has suffered and will continue to suffer great pain, all to his damage in the sum of Fifty Thousand Dollars (\$50,000.00).

VIII.

As a direct result of defendant's negligence and failure to provide a safe and proper place for plaintiff to work, and by reason of the aforesaid injuries, plaintiff has been prevented from following his occupation as an experienced brakeman and thereby lost a portion of his usual wages and earnings of approximately Five Hundred Seventy Dollars (\$570.00) per month from the said date of said accident to March 16, 1945, to his further damage in the sum of Three Thousand Six Hundred Dollars (\$3,600.00), in that he will be prevented from attending to his usual vocation.

Wherefore, plaintiff prays judgment against the defendant for:

- (1) \$50,000.00 general damages for injuries to his person.
- (2) \$3,600.00 for loss of earnings, and for such further sums as may accrue.
- (3) Costs of action and such further relief as the Court deems just.

DESSER, RAU & CHRISTENSEN

By Wm. Christensen by R.R.A.

Attorneys for Plaintiff [4]

[Verified.]

[Endorsed]: Filed Oct. 31, 1945. [5]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, UNION PACIFIC
RAILROAD COMPANY, ERRONEOUSLY
SUED AND SERVED HEREIN AS "UNION
PACIFIC RAILROAD"

Defendant, Union Pacific Railroad Company, erroneously sued and served herein as "Union Pacific Railroad", for answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits the allegations of paragraphs I, II, III and IV of said complaint.

II.

For answer to the allegations of paragraph V of said complaint, defendant has not knowledge, information or belief sufficient to enable it to answer the allegation that plaintiff sustained a fall at or near El Cajon Station on or about January 21, 1944, and basing its answer on that ground, defendant denies said allegations. Defendant denies absolutely and not merely upon information and belief that plaintiff then or there or at all was caused to fall by reason of any carelessness or negligence on the part [6] of this defendant or on the part of its agents or servants other than plaintiff, whether as alleged in said complaint or otherwise. Said defendant further denies absolutely that it fastened or secured a tractor to the floor of one of the flat cars in the freight train men-

tioned in said complaint with wires that were frayed, weather-beaten, dark or coated. Denies that defendant fastened any wires around said tractor improperly, carelessly or negligently.

III.

Defendant denies the allegations of paragraph VI of said complaint and each of them.

IV.

Defendant has not knowledge, information or belief sufficient to enable it to answer the allegations of paragraphs VII or VIII of said complaint, and basing its answer on that ground, defendant denies said allegations and each of them and specially denies that plaintiff suffered damage in the sum of \$50,000.00 or any other amount or sum whatsoever by reason of injury to person or that plaintiff suffered damage in the sum of \$3,600.00, or any other sum or amount whatsoever for loss of wages, all whether as alleged in said complaint or otherwise.

V.

Defendant denies that plaintiff suffered injury of any kind or character or sustained damage in any sum or amount whatsoever as the proximate or any result of any carelessness or negligence on the part of defendant or on the part of the agents, servants or employees of defendant other than plaintiff, whether as alleged in said complaint or otherwise.

VI.

For a Further, Separate and Second Answer and Defense to said complaint, defendant is informed and believes and upon [7] such information and belief alleges that at or about the time and place set forth in said complaint, plaintiff conducted himself so carelessly and negligently while on the flat car mentioned in said complaint as to cause himself to fall therefrom. That any injury or damage suffered or sustained by plaintiff as the result of such fall was proximately and concurrently caused by and contributed to by the carelessness and negligence of the plaintiff as aforesaid.

Wherefore, defendant prays judgment for its costs and for all proper relief.

E. E. BENNETT

EDWARD C. RENWICK

MALCOLM DAVIS

By Malcolm Davis

Attorneys for Defendant [8]

[Verified.]

[Endorsed]: Filed Nov. 27, 1945. [9]

[Title of District Court and Cause.]

MEMORANDUM DECISION

Hall, J.

The judgment will be for the plaintiff. (See *Pitcarn vs. Perry*, 10th Cir., 1941; 122 Fed. (2) 881: Cert. denied, 314 U. S. 697.)

From the evidence it appears that the plaintiff lost 177 days work. The evidence shows that he was paid \$8.24 for each one hundred miles. While he testified that his average run was 250 miles per day, the evidence does not bear him out. Nor is the evidence clear as to the number of days which he worked during the months of September and October, 1944. From the evidence, however, it appears that he worked 196 days, from January to August, inclusive, and averaged 164 miles per day. Taking this average figure as the average rate of earnings during the 177 days he lost on account of the accident, and allowing

[H.] 100

him \$8.24 per \wedge mile; it shows a total of \$2,383.66 as his loss of earnings.

As in all cases any sum for pain and suffering is difficult to ascertain or to fix. In this case I think a nominal sum would compensate the plaintiff, and \$500.00 is allowed for pain and suffering. [10] The total judgment, therefore, will be \$2,883.66.

The plaintiff will prepare findings of fact and conclusions of law.

[Endorsed]: Filed May 31, 1946. [11]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on May 7, 1946, before the Honorable Peirson M. Hall, Judge of the above entitled Court, sitting without a jury, a jury having been expressly waived, Messrs. Desser, Rau & Christensen, by Jack L. Karen, Esquire, appearing for plaintiff, and Messrs. E. E. Bennett, Edward C. Renwick and Malcolm Davis, appearing as attorneys for defendant, and oral and documentary evidence having been produced and introduced on behalf of both parties and the Court having considered the same and heard the arguments of counsel and being fully advised, makes the following findings of fact:

I.

The allegations contained in paragraphs I, II, III, IV, V and VI of plaintiff's complaint are true. [12]

II.

It is true that in the accident mentioned in paragraph V of said complaint, and as a direct and proximate result of defendant's negligence and carelessness as alleged in paragraphs V and VI of said complaint, plaintiff sustained injuries to his person; the muscles, tissue, walls and membrane in plaintiff's abdomen were severely torn, lacerated, weakened and ruptured; and he became sore and lame and suffered pain, all to his damage in the sum of \$500.00.

III.

It is true that as a direct and proximate result of defendant's negligence and failure to provide a safe and

proper place for plaintiff to work, and by reason of his said injuries, plaintiff was prevented from following his usual vocation as a brakeman for a period of 177 days, to his damage in the sum of \$2,383.66.

IV.

None of the allegations contained in paragraph VI of defendant's answer is true.

V.

Except as otherwise hereinabove specifically found, all of the allegations of the complaint are true and none of the allegations or denials of the answer is true.

CONCLUSIONS OF LAW

From the foregoing facts the court makes the following conclusions of law:

I.

Plaintiff is entitled to judgment against defendant decreeing that he recover from defendant, together with his costs of suit incurred herein.

Dated: June 17th, 1946.

PEIRSON M. HALL

Judge [13]

[Affidavit of Service by Mail.]

[Endorsed]: Lodged Jun. 10, 1946. Filed Jun. 17, 1946. [14]

In the District Court of the United States
Southern District of California
Central Division

No. 4876-PH

MARTIN R. DeVANEY,

Plaintiff,

vs.

UNION PACIFIC RAILROAD,

Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on May 7, 1946, before the Honorable Peirson M. Hall, Judge of the above entitled court, sitting without a jury, a jury having been expressly waived, Messrs. Desser, Rau & Christensen, by Jack L. Karen, Esquire, appearing for plaintiff, and Messrs. E. E. Bennett, Edward C. Renwick and Malcolm Davis, appearing as attorneys for defendant, and oral and documentary evidence having been produced and introduced, and the cause submitted for decision, and the court having heretofore made and caused to be filed its written findings of fact and conclusions of law.

It Is Ordered, Adjudged and Decreed that plaintiff recover from defendant \$2,883.66, together with costs amounting to \$66.25.

Dated: June 17th, 1946.

PEIRSON M. HALL

Judge

Judgment entered Jun. 17, 1946. Docketed Jun. 17, 1946. C. O. Book 38, page 730. Edmund L. Smith, Clerk; by J. M. Horn, Deputy Clerk. [15]

[Affidavit of Service by Mail.]

[Endorsed]: Lodged Jun. 10, 1946. Filed Jun. 17, 1946. [16]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given: That Union Pacific Railroad Company, a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final Judgment entered in this action on June 17, 1946, and from the whole thereof.

Dated: August 2, 1946.

E. E. BENNETT
EDWARD C. RENWICK
MALCOLM DAVIS

By Malcolm Davis

Attorneys for Appellant [17]

Received copy of the within Notice of Appeal this 2nd day of August, 1946. Desser, Rau & Christensen, Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 2, 1946. [18]

[Title of District Court and Cause.]

BOND ON APPEAL
SUPERSEDEAS BOND

Know All Men By These Presents:

That Continental Casualty Company, a corporation of the State of Indiana, authorized to do a general surety business in the State of California, as Surety, is held and firmly bound unto Martin R. DeVaney, Plaintiff, and to his executors, administrators and assigns, in the full and just sum of Five Thousand (\$5,000.00) Dollars, for the payment of which well and truly to be made, said Surety binds itself, its successors and assigns, firmly by these presents.

The conditions of the above obligation are such that,

Whereas, on June 17, 1946, Judgment in favor of Plaintiff and against Defendant in the above entitled action, was rendered and entered in Civil Order Book No. 38, Page 730 and said Defendant having filed a Notice of Appeal from said Judgment and the whole thereof, to the United States Circuit Court of [19] Appeals for the Ninth Circuit.

Now, Therefore, if the said Defendant, Union Pacific Railroad Company, a corporation, shall prosecute its appeal to effect, or shall satisfy the judgment in full, together with costs, interest and damages for delay, if any, if for any reason the appeal is dismissed, or if the Judgment is affirmed, or shall satisfy in full such modifica-

tion of the Judgment and such costs, interest and damages as the said Circuit Court of Appeals may adjudge and award, then this obligation shall be void; otherwise, to remain in full force and effect.

In Witness Whereof, said Continental Casualty Company has caused this obligation to be executed and its corporate seal to be hereto affixed by its proper officers thereunto duly authorized, this 2nd day of August, 1946.

(Seal) CONTINENTAL CASUALTY COMPANY

By D. Steres

Its Attorney in Fact

State of California

County of Los Angeles—ss.

On this 2nd day of August, 1946, before me, Hazel A. Howell, a Notary Public in and for the County and State aforesaid, residing therein, duly commissioned and sworn, personally appeared D. Steres, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of the Continental Casualty Company, and acknowledged to me that she subscribed the name of the Continental Casualty Company thereto as principal and her own name as Attorney-in-fact.

(Seal)

HAZEL A. HOWELL

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires August 26, 1949.

The foregoing Bond is hereby approved this 2nd day of August, 1946.

C. E. BEAUMONT

District Judge of the United States, Presiding [20]

Received copy of the within Bond on Appeal this 2nd day of August, 1946. Dessser, Rau & Christensen, Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 2, 1946. [21]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL
EXHIBITS

It Is Hereby Ordered that the original exhibits introduced in evidence at the trial of the above action, namely, plaintiff's Exhibits 1 to 6, inclusive, and defendant's Exhibits A to F, inclusive, shall be transmitted to the Circuit Court of Appeals for the Ninth Circuit as a portion of the certified record on appeal.

Dated, at Los Angeles, California, August 15, 1946.

C. E. BEAUMONT

Judge

[Endorsed]: Filed Aug. 16, 1946. [22]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 25 inclusive contain full, true and correct copies of Complaint for Personal Injuries; Answer of Defendant Union Pacific Railroad Company; Memorandum Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Bond on Appeal; Order for Transmission of Original Exhibits; and Designation of Record which, together with copy of Reporter's Transcript and Original Plaintiff's Exhibits 1 to 6 inclusive and Original Defendant's Exhibits A to F inclusive, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$6.25 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 10 day of September, A. D. 1946.

(Seal)

EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Title of District Court and Cause.]

Honorable Peirson M. Hall, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, May 7 and 8, 1946

Appearances:

For the Plaintiff: Desser, Rau & Christensen, 806 Union Bank Building, Los Angeles, California; by Jack L. Karen, Esq.

For the Defendant: Malcolm Davis, Esq., 422 West Sixth Street, Los Angeles, California.

Los Angeles, California; May 7, 1946;

10:00 O'Clock A. M.

The Clerk: No. 4876, Civil; Martin R. DeVaney v. Union Pacific Railroad.

Mr. Karen: Ready for the plaintiff.

Mr. Davis: Ready for the defendant.

* * * * *

The Court: Counsel for the plaintiff is listed here in the files as Desser, Rau & Christensen.

Mr. Karen: Yes. My name is Karen, from the firm; Jack L. Karen, K-a-r-e-n.

The Court: An order will be made associating Jack L. Karen as one of counsel for the plaintiff, of the firm of Desser, Rau & Christensen.

And Mr. Malcolm Davis for the defendant?

Mr. Davis: That is right.

Mr. Karen: Your Honor, I have subpoenaed a Mrs. Cooper from the Good Samaritan Hospital, who is custo-

dian of certain hospital records concerning an operation and treatment of the plaintiff. I would like at this time to have her take the stand out of order in order that she may present these documents and then permit her to go back to her duties.

Mr. Davis: I have no objection.

The Court: Very well.

Mr. Karen: Mrs. Cooper. [3*]

MRS. ELIZABETH COOPER

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Elizabeth Cooper.

The Clerk: And your address?

The Witness: 2505 West Sixth Street.

The Clerk: Take the stand.

Direct Examination

By Mr. Karen:

Q. Is it Mrs. Cooper? A. Mrs.; that is right.

Q. Mrs. Cooper, where are you employed?

A. At the Good Samaritan Hospital.

Q. What are your duties there?

A. I am the medical record librarian.

Q. Were you employed at that hospital in that capacity on or about November 8, 1944? A. No, I was not.

(Testimony of Mrs. Elizabeth Cooper)

Q. Have you charge of medical records as of that date in 1944?

A. As of that date, yes, sir; I do have.

Q. Do you have in your possession certain records pertaining to the plaintiff in this case, Martin R. DeVaney, concerning his entrance into the hospital on or about Novem- [4] ber 8, 1944?

A. Yes, I do.

Q. What records do you have in your possession?

A. I have just the hospital record. There were no X-rays.

Mr. Karen: I have not seen these, your Honor. I have subpoenaed them but have not seen them.

The Court: Go ahead and look at them.

(Counsel examining records.)

Mr. Karen: Your Honor, at this time I would like to introduce these records as the plaintiff's Exhibit No. 1.

Mr. Davis: I have no objection.

The Court: Very well. Plaintiff's Exhibit No. 1.

(The records referred to were received in evidence and marked Plaintiff's Exhibit No. 1.)

The Court: Now those are all of the records of the Good Samaritan Hospital which relate to this plaintiff from his entrance into the hospital on November 8, 1944?

The Witness: Yes.

The Court: Until when?

The Witness: Until his discharge, which is on the record there.

Mr. Davis: I think it is November 26, your Honor.

The Court: Until his discharge?

(Testimony of Mrs. Elizabeth Cooper)

The Witness: That is right. [5]

The Court: On November 26, 1944?

Mr. Karen: On or about that date.

Q. Mrs. Cooper, you have no personal knowledge of what is contained in those records, is that right?

A. That is right.

Mr. Karen: I have no further questions to ask her.

Mr. Davis: I have no questions.

The Court: Very well. Will it be stipulated that at the conclusion of the trial either these exhibits may be returned to the hospital or they may be returned to the hospital upon substitution of photostatic copies?

Mr. Davis: So stipulated.

Mr. Karen: So stipulated.

The Witness: Judge, may I have this signed by the attorneys and also by you? Then I won't have so much difficulty.

Mr. Karen: What is it?

(The document referred to was passed to counsel.)

Mr. Karen: That is just what the judge ordered and we stipulated to that in open court. Do you want this signed now?

The Witness: Yes, I would like to.

(Counsel signing document as requested.)

The Court: Then hand it to the clerk. He is the custodian of the records. He can sign it. [6]

Mr. Karen: I have no further questions of the witness.

The Court: Very well. You may be excused. Do you wish to take this with you now?

(Testimony of Mrs. Elizabeth Cooper)

The Witness: Yes, I do.

The Court: All right.

(Witness excused.)

Mr. Karen: Mr. DeVaney, will you take the stand, please.

MARTIN R. DeVANEY

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Martin R. DeVaney.

The Clerk: Your address?

The Witness: 1219 West Tenth Street, San Bernardino.

The Clerk: Take the stand, please.

The Court: Counsel for the defendant said something about having some doctors here from San Bernardino. Are they here today?

Mr. Davis: Dr. Ballachey is here from Yermo, and he is the plaintiff's witness, as I understand it. He has been subpoenaed by the plaintiff. It might be well if we could take him.

The Court: You don't have any of your doctors here?

Mr. Karen: Dr. Nevin will be here at 2:00 o'clock. [7] Dr. Gamette, the chief surgeon of the Union Pacific, called me yesterday and asked me if I would call him just about the time we needed him.

The Court: He is in Los Angeles?

Mr. Karen: He is in Los Angeles, Dr. Gamette is.

The Court: The only thing I had in mind, these out-of-town witnesses, if we took them now it might suit their

(Testimony of Martin R. DeVaney)

convenience. Unless it will destroy the logical presentation of your case, I would like to accommodate them so that they can go back to Yermo.

Mr. Karen: Your Honor, I assure you that if I do use Dr. Ballachey I am sure I will use him today, so as long as he is down here he will get back to Yermo tonight.

The Court: Very well.

Direct Examination

By Mr. Karen:

Q. You are Martin R. DeVaney? A. Yes, sir.

Q. Will you speak up, Mr. DeVaney, so that we can all hear you? A. Yes, sir.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. What is your occupation, Mr. DeVaney?

A. Brakeman on the Union Pacific. [8]

Q. How long have you been employed by them?

A. Since October 26, 1942.

Q. How long have you been following that particular line of work? A. Since September 27, 1926.

Q. Have you worked for the Union Pacific—strike that.

Prior to your employment by the Union Pacific on or about the 26th of October 1942, did you receive a physical examination by doctors representing that company?

A. Yes, I did.

(Testimony of Martin R. DeVaney)

Q. When did you receive your first physical examination?

A. The first physical examination I received was in the Chicago Northwestern Depot for the Union Pacific Railroad.

Q. Who examined you?

A. Their own doctor of the Chicago Northwestern. That is part of the Union Pacific medical system, so I understand.

The Court: Do you know his name?

The Witness: I don't know the doctor's name. It is just the company doctor that I was sent to.

By Mr. Karen:

Q. Do you know what the result of that examination was?

A. He said I was all right and let me proceed to [9] Omaha to be employed.

Q. Were you examined at Omaha? A. No, sir.

Q. When did you receive your next examination?

A. The next examination I received was by Dr. Gamette on my arrival in Los Angeles.

Q. When was that?

A. That was around on or about the 24th of October, 1942.

Q. Do you know what the result of that examination was?

A. I was okay for service, and I joined the Union Pacific, and made my first day of work on October 26th.

Q. Were you working for the Union Pacific on or about January 21, 1944; A. I was.

(Testimony of Martin R. DeVaney)

Q. Where were you employed at that time?

A. I was employed out of San Bernardino, a local that ran between San Bernardino and Yermo.

Q. In what capacity? A. As a brakeman.

Q. What was your job?

A. Well, my position was to observe the running condition of the train and follow the instructions of the conductor as to what cars should be placed at certain stations, and [10] also pick up cars as the conductor would instruct me.

Q. In other words, you were working on a local freight train?

A. A local freight train; that is right.

Q. Was it part of your job to walk along the cars?

A. I had to examine the train from end to end at every stop we made, or walk as far as I could and catch the rear end of the train as it passed by.

The Court: You examined it for what?

The Witness: For the condition of the running gear and the general safety of the train; that everything was in order on my observance.

By Mr. Karen:

Q. This particular route that the train took, is that on level ground or mountain territory?

A. No, it is on the mountain. You go up one side of the mountain and down the other side.

Q. Is there any particular name for that locality?

A. Well, they call it Cajon Pass.

Q. Do you recall anything unusual that happened on January 21, 1944? A. Yes, sir.

(Testimony of Martin R. DeVaney)

Q. What?

A. I fell from the train coming down the mountain on the westward leg of our trip at Cajon Pass. [11]

Q. Where were you prior to falling off the train?

A. I was riding on the train as we were moving down the mountain, on top of a car.

Q. What kind of a car was it that you were on?

A. It was a boxcar I was on until I got to this station.

Q. Will you explain to his Honor just what happened at that time?

A. Just before we arrived at Cajon Station I observed fire flying from about the second or third car ahead of me, and I climbed down on this boxcar onto a flatcar and started to walk along the left side of the flatcar. And as we were coming into this station, the slack of the train, the movement of the train shifting forward and backward coming down the mountain, this flatcar contained two Army trucks, one of them was loose on the track, and as I walked along holding onto it going along on this flatcar to the end, this truck went with me, with the movement of my body, and I caught my feet in some broken wires on the floor of the car and fell from the train.

The Court: You didn't fall from the top of a boxcar then?

The Witness: I fell from a flatcar.

The Court: You fell from a flatcar?

The Witness: That these two Army trucks were on. [12]

(Testimony of Martin R. DeVaney)

By Mr. Karen:

Q. In other words, you had climbed down from the boxcar and were proceeding to cross the flatcar?

A. That is right.

Q. When this occurred? A. Yes, sir.

Q. Was the train in motion when you fell off?

A. The train was running about 15, 20 miles an hour.

Q. In what position did you fall?

A. I fell on my abdomen, flat.

Q. Did you fall on anything in particular?

A. When these wires caught my feet they threw my feet in the air and I lost my balance and went through the air and I fell—there was some pieces of wood and lumber, debris, that lay on the ground some distance from the railroad track right near a switch—and I fell on this debris.

Q. What happened after you fell?

A. Well, when I fell why I lost my breath and I lay there a while and finally one of the boys helped me up.

Q. Before we come to that, did the train stop or keep on going? A. The train kept on going.

Q. What is the first thing you did then after you were flat on your abdomen?

A. The first thing I did was to try to gain myself [13] back on my feet.

Q. Did you suffer any injuries?

A. I wanted to get my breath.

Q. Did you suffer any injuries that you noticed at that time?

A. I felt something sharp pierce my side as I fell.
(Indicating)

(Testimony of Martin R. DeVaney)

Q. Indicating your left abdomen?

A. Yes. I fell on my left side.

Q. Did you suffer any other injuries as a result of this fall?

A. I hit my mouth on the ground and cut my lip and broke a piece of tooth off, and cut my knee. With all the sharp lumber laying there, I hit and slid right through it.

Q. After the immediate fall, did anybody come to your help or did you get up by yourself, or what happened?

A. No. One of the other members of the crew helped me up.

Q. Do you recall who that was?

A. Yes, I recall. It was the flagman.

Q. What is his name?

A. Mr. Anderson; K. D. Anderson.

Q. What happened after he came?

A. He helped me up on my feet and led me over to the [14] caboose, and I sat on the steps so that I could regain myself back together again.

Q. Were you suffering any pain at that time?

A. Yes.

The Court: I thought you said the train kept on going.

The Witness: The train had stopped. After I fell he had to get off to line the switch, and he saw me lying on the ground and helped me up.

By Mr. Karen:

Q. This Mr. Anderson, what part of the train was he on, if you know?

A. He was on the rear car, on the caboose.

(Testimony of Martin R. DeVaney)

Q. I believe I asked you the question, did you suffer any pain at that time. A. Yes, I did.

Q. What kind of pain?

A. Well, I suffered pain mostly in the lower part of my abdomen and my mouth, and of course I didn't gain my breath yet until I was led to the caboose and recuperated, but my stomach hurt me very severely.

Q. What did you do after you had sat on the steps of the caboose for a while?

A. When I got my bearings together I walked over the railroad track to the operator's office right directly across from the caboose, and I told the conductor I fell and was [15] hurt.

Q. Do you recall his name? A. Russell Brown.

Q. What did he say, if anything?

A. He asked me where I was hurt, and I told him my stomach was hurt, and I told him, "I am going over to the caboose and lay down."

Q. Did you do that? A. Yes, I did that.

Q. How long a period of time did you lie down in the caboose?

A. We were there quite a while. I would say an hour or more at that time before we left that station.

Q. Where did the train go to from that station?

A. It went down to the next station, which is called Devore.

Q. Did you work at all during that part of the trip?

A. No, I didn't go back out on the train at that time.

Q. When you reached the next station of Devore, did you talk to anybody at that place?

A. I got off the caboose and walked about two or three cars ahead of the caboose slowly because I wanted

(Testimony of Martin R. DeVaney)

air. I was pretty much suffocated for air. It was in the wintertime and it was too warm in the caboose the way I felt. I was pretty weak. I walked up a little ways and met the head brakeman, [16] Mr. Hopkins, and told him I had fallen off the train. I said, "I want to show you the car." And we went to the car. It was about two more car lengths to go, about four or five car lengths from the caboose. We got there and I showed him how I fell. Mr. Hopkins took his brake club and bent the wires down flush to the floor.

Q. Did you climb up on the car?

A. No, I did not climb upon the car because I was in no condition to.

Q. What happened after that?

A. I told him I was going back and stay in the caboose.

Q. Did you do that?

A. I did that all the way home.

Q. Did you perform any more work until you reached San Bernardino?

A. No, sir.

Q. What happened after you got to San Bernardino?

A. I rode home with Mr. Hopkins. He took me home.

Q. Then what happened at home?

A. When I got home why I told my wife that—after she got up, she usually gets up to make my meal when I get home, it was a late hour in the morning—and I told her I didn't feel like eating anything.

Q. Incidentally, Mr. DeVaney, I believe I didn't ask you what time of night this happened, when you fell off the [17] car.

A. That was 10:30 at night.

Q. And you arrived in San Bernardino at what time?

A. About 2:00 o'clock in the morning.

(Testimony of Martin R. DeVaney)

Q. And shortly after that you got to your home, is that correct? A. I got to my home.

Q. Now go ahead from there. You talked to your wife?

A. After my arrival I talked to my wife and I said I didn't care about eating.

Q. Why?

A. Well, I usually eat a big meal when I get home, but I just was upset. My stomach just didn't feel like carrying any food. So she insisted I take a cup of coffee anyhow. I drank the coffee.

Then I proceeded in having a shower. I wanted to let the water run on my abdomen to see if it would make it feel more relieved.

Q. Did you look at your abdomen? A. Yes.

Q. What did you observe?

A. It was swollen. It was beginning to swell.

Q. What part of your abdomen?

A. The left side, the lower part of the stomach.

Q. Was there any discoloration? [18]

A. It was just red, just inflamed.

Q. You noticed the swelling, is that right?

A. It was swelling.

Q. What happened after then, after the shower?

A. After I took the shower then I went to bed. Then I got up in the night. I called my wife and she got up, and I had like stomach cramps, severe pains in the left side, and I vomited that coffee that I drank.

Then she rubbed my side with alcohol, and I tried to sleep the rest of the night. It was periodic; it wasn't steady sleeping.

(Testimony of Martin R. DeVaney)

Q. What time did you get up?

A. I got up quite early the next day. I usually get up around 12:00 o'clock, but I got up somewhere around 9:30, 10:00 o'clock.

Q. What did you do then?

A. I called the railroad and asked them to let me off because I got hurt and I wanted to see the doctor.

Q. Who did you talk to, do you remember?

A. I talked to, I believe it was, a man by the name of Palmer at that time. There were several crew dispatchers, assistants and crew dispatchers, at the Santa Fe crew dispatching office.

Q. What did he say?

A. He said I would have to see the doctor first before [19] I could get off because we had no men. We were short of outside crews and had no extra men.

Q. Did you see the doctor?

A. I called Dr. Nevin's office and his nurse said he wouldn't be in.

Q. Dr. Nevin? A. Dr. Nevin.

Q. Is he in San Bernardino?

A. He is the company doctor in San Bernardino.

Q. Did you go to his office?

A. No, I didn't go to his office. I phoned from the phone right in the housing project where I lived, the Santa Fe housing project.

Q. Was it possible to make an appointment with Dr. Nevin?

A. Well, usually the way he was so busy during the wartime there, we had to go to his office and see him at his office hours. He didn't want to be disturbed, that is, he didn't want to be called out for anything else because

(Testimony of Martin R. DeVaney)

he was just too busy. It was hard to get hold of him at any time.

Q. His girl there told you he couldn't see you that day?

A. The doctor wouldn't be in today, and I told her I wanted to see him about something, because I didn't want to go to work, I didn't feel like it, and she said, "You better take it up with the doctor." [20]

Q. Did you go to work that day?

A. I called back and said I couldn't make it, and if I did go to work I wouldn't do nothing the way I felt, and I couldn't see the doctor. And he says. "There is no alternative; you either show up, or else."

Q. Or else what?

A. Then you are called in for an investigation to show cause why, and you might be discharged.

Q. In other words, you had to have a doctor's report of some kind in order to not go to work, is that right?

A. At that particular time they had no men, and they had quite a time even keeping a man on.

Q. Did you report for work then?

A. I reported for work.

Q. At what time?

A. That was around 2:00, 2:30 in the afternoon.

Q. Of January 22nd? A. January 22nd.

Q. 1944? A. Yes, sir.

Q. You made the round trip then?

A. I made the round trip to Yermo.

Q. Did you work on the trip to Yermo?

A. When I got to Yermo—

(Testimony of Martin R. DeVaney)

Q. Answer my question, did you work on the trip to [21] Yermo? A. I didn't do any active duties.

Q. What did you do?

A. I just merely rode along with the train.

Q. Was your abdomen still swollen?

A. Yes, my abdomen was swollen and there was swelling forming in the lower left testicle.

Q. Were you experiencing any pain at that time?

A. It was just irritating pain there.

Q. What happened when you got to Yermo?

A. When I got to Yermo I went over to see Dr. Ballachey.

Q. Did you tell him what happened?

A. It was quite late at night and I had to get him out of bed.

Q. Where did you see him?

A. At his house.

Q. Is that where he normally sees his patients?

A. Yes. He has a residence right next to the depot in Yermo. He examined me.

Q. Before we go into that, did you ever see Dr. Ballachey before this time about anything?

A. No, I never saw him prior to that.

Q. All right. Then you woke him up and what happened?

A. I explained to him that I had fallen from the train [22] and my abdomen was swollen, and I was experiencing a lot of pain in that section, and also towards the lower testicle as well.

Q. Did he examine you?

A. He used the regular examination for that part of the body.

(Testimony of Martin R. DeVaney)

Q. What did he do? Do you remember what he did?

A. He used his thumb between the leg and abdominal passage, the groin, and had me cough, and told me that he believed I had a hernia.

Q. Before you went to see Dr. Ballachey, did you have a letter or a card or anything to go to see him?

A. No, it wasn't necessary. We just went to see him. They finally, a long time after that, had little slips that you had to take to the doctor in order to get to see him.

Q. But at the time you went to see Dr. Ballachey, that procedure wasn't necessary?

A. No, it was a rush time of business and we just went to the doctor when he was available and saw him when we could.

Q. Did Dr. Ballachey say anything else to you?

A. Dr. Ballachey asked me how I got there. I said I worked up because I couldn't see Dr. Nevin, and I told him I didn't feel like working back.

Q. What did he say?

A. And he said, "You better see Dr. Nevin down there [23] if you can get home at all. You can expect anything like that from that kind of an injury. He said, "Sometimes they get real serious and sometimes not." But he examined me to the point where he believed I was fit to get home to see Dr. Nevin, and he told me I would have to have immediate surgery. That is one thing he said.

Q. Did you talk to anybody else up at Yermo besides Dr. Ballachey?

A. I came back from Dr. Ballachey's office and Mr. Anderson and Mr. Hopkins were in the depot, and I

(Testimony of Martin R. DeVaney)

told them what Dr. Ballachey had found. I said, "I have to be operated on for this injury that I got."

Q. Did you take the same train back to San Bernardino? A. I went right back with the crew.

Q. Did you work?

A. I didn't do any active work. The boys helped me out.

Q. Were you experiencing any pain on the return trip?

A. The pain was continuous, just an agitating pain in the abdomen.

Q. When you got back to San Bernardino did you see Dr. Nevin?

A. I didn't see Dr. Nevin right away because Dr. Nevin was pretty hard to see. I saw Dr. Ballachey again before I saw Dr. Nevin. I continued to work. [24]

Q. When did you see Dr. Ballachey again?

A. A few days after, possibly about two trips, the second trip into Yermo.

Q. You continued to make another or two trips, is that right? A. Yes, I continued to work.

Q. Why did you do this?

A. Well, we couldn't get off in San Bernardino. You just had to keep right on working.

Q. When you saw Dr. Ballachey the second time, what happened?

A. I saw Dr. Ballachey the second time and this time we discussed an insurance examination that I had to take.

Q. Do you remember what date that was?

A. I didn't take the examination for the insurance the second time I saw Dr. Ballachey.

(Testimony of Martin R. DeVaney)

Q. I say, do you recall? Was it two days later or a week later?

A. About two trips afterwards. I wanted to see if I could get anything to relieve me of the pain down there.

Q. At that time he was going to examine you for an insurance policy, is that right?

A. I discussed it with him.

Q. What did he say?

A. I just had a notice of the examination, but I didn't [25] have the papers yet.

Q. What did he say?

A. Well, he told me just to rest as much as I could, and when I got the papers to bring them in and he would examine me for the insurance.

Q. When did you see Dr. Nevin, if at all?

A. I saw Dr. Nevin—I got the papers for the examination and I returned to Dr. Ballachey, and he examined me for the insurance.

The Court: When did you see Dr. Nevin?

The Witness: I saw Dr. Nevin, I should say, about a week after I saw Dr. Ballachey.

By Mr. Karen:

Q. What did he say?

A. He said I should go right down and see Dr. Gamette, the chief surgeon, for the surgery. That is the only thing they could do for me.

Q. That was about a week after the accident?

A. That was a week or 10 days after the accident.

Q. Did Dr. Nevin tell you that you had a hernia?

A. Dr. Nevin told me I had a hernia and the condition of my abdomen would only be remedied by surgery, and he couldn't take care of that.

(Testimony of Martin R. DeVaney)

Q. Did he say anything to you about continuing to work?

A. He told me I could stay on the job as long as I [26] could, and if I didn't feel good, why just mark off, that is, to lay off.

Q. Did you see Dr. Gamette?

A. I saw Dr. Gamette after that trip to Dr. Nevin. That was about two weeks after I saw Dr. Nevin.

Q. Did Dr. Gamette examine you?

A. Dr. Gamette examined me.

Q. Do you know what the result of his examination was?

A. He said that he would have to operate on me, and he would notify me the time of the operation.

Q. Operate on you for what? A. For a hernia.

Q. Incidentally, you mentioned that you had suffered a broken tooth. Did you see anybody about that?

A. I saw Dr. Hutchison in San Bernardino, a dentist.

Q. What did he do for you?

A. He treated the tooth to quiet the nerve.

Q. Did you report that to Dr. Ballachey or Dr. Nevin or Dr. Gamette?

A. I showed them that. I told them about it, but the main part, the part that hurt me the most, was my lower organs.

Q. At the time you visited Dr. Gamette in Los Angeles, was that swelling still there? A. Yes. [27]

Q. Were you experiencing any pain at that time?

A. I explained to him how it was affecting me, that it was giving me a cramped condition and affecting my left side and my testicle was swelling and receding. It would just swell up and go down as I stayed on my feet.

(Testimony of Martin R. DeVaney)

Q. You stated that Dr. Gamette mentioned something about surgery and a hospital. What did he say about that?

A. He said that owing to the crowded condition it would take about a month to get a surgical date, and he would notify me and I could come down and he would operate on me.

Q. Do you recall the date when you saw Dr. Gamette and he made that statement?

A. I don't recall the date because it was awfully hard for us to get away from our work and get a man to come from Los Angeles to take my place to get down to see Dr. Gamette. It took quite a while before they could send a man up and take care of my condition.

Q. Do you recall what month that was?

A. I would say that would be April, April of '42.

Q. Of when? A. April of '44, I mean.

The Court: That is the first time you saw him?

The Witness: That is the first time.

The Court: I thought you said it was two weeks after you saw Dr. Nevin. [28]

The Witness: I saw Dr. Ballachey, then Dr. Nevin afterwards, and then there was a little spell of time in there before I got to see Dr. Gamette, the chief surgeon.

Mr. Karen: I think the dates are a little confusing here.

Q. Did you ever write a letter to Dr. Gamette about your condition? A. Yes.

Q. Do you recall when you wrote that letter?

A. I wrote that letter to him—I wrote to him twice; I wrote once in around April.

(Testimony of Martin R. DeVaney)

Q. Did you ever receive a letter from Dr. Gamette?

A. No—I beg your pardon—I did receive a letter answering my first question that I wrote to him about.

(Counsel exhibiting document.)

Mr. Davis: I don't see any materiality in that, your Honor.

Mr. Karen: I haven't introduced it yet. First I will lay a foundation here.

The Court: All right.

By Mr. Karen:

Q. I am showing you here what purports to be a letter headed Union Pacific Railroad Company. Do you recognize that letter? A. Yes. [29]

Q. Did you receive that letter? A. Yes, sir.

The Court: When?

The Witness: I received that—

The Court: On or about the date it bears?

The Witness: It was about the date it bears. Some-time in April.

By Mr. Karen:

Q. Do you recall what this letter stated?

A. Yes.

Q. What?

Mr. Davis: Just a minute, if the Court please. I feel this way about it—

The Court: Mark it for identification first.

Mr. Davis: —there is no injury here and I don't mean to object because I know the Court can sift the evidence,

(Testimony of Martin R. DeVaney)

but I see no reason for cluttering up the record unnecessarily.

The Court: Mark it for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.)

[PLAINTIFF'S EXHIBIT NO. 2]

UNION PACIFIC RAILROAD COMPANY

Hospital Department

Douglas L. Gamette

Chief Surgeon

South-Central District

523 West Sixth Street

Los Angeles, 14, California

April 13, 1944

Mr. Martin R. DeVaney

1105 LaJunta Street

San Bernardino, California

Dear Mr. DeVaney:

Reference is made to your letter of March 31, 1944, concerning your operation.

The expense involved in your hospital care will, of course, be borne by this department. The decision regarding any compensation is handled through the General Claim Department and I would suggest that you contact their office at 412 West Sixth Street, Los Angeles, in this connection.

(Plaintiff's Exhibit No. 2)

Hoping that this information will be of some assistance to you in making your arrangements, I am

Most sincerely yours,

D L Gamette

D. L. GAMETTE, M.D.

Chief Surgeon

b

CC Mr. M. R. Clark

General Claim Department

Union Pacific Railroad Company

412 West 6th Street

Los Angeles 14, California

Mr. J. F. Cox

Case No. 4876-PH. DeVaney vs. U. P. R. R. Plfs.
Exhibit No. 2. Date May 7, 1946. No. 2 Identification.
Clerk, U. S. District Court, Sou. Dist. of Calif. J. M.
Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court
of Appeals for the Ninth Circuit. Filed Sep. 12, 1946.
Paul P. O'Brien, Clerk.

The Court: What is the purpose, to fix the date he saw
Dr. Gabette?

Mr. Karen: No, to refresh his memory and fix the
dates when he first saw Dr. Gamette. This letter is an
answer to a letter he had written, indicating that he had
been down to [30] see Dr. Gamette prior to the letter he
wrote.

Mr. Davis: I don't mean to be technical.

(Testimony of Martin R. DeVaney)

Mr. Karen: He is a little confused on these doctors and the dates. It happened a couple of years ago. I am just trying to refresh his memory.

The Court: He first said he saw Dr. Gamette two weeks after he saw Dr. Nevin, and then he said he didn't see him until about April.

Mr. Karen: That is right, if the Court understands that.

Mr. Davis: To save confusion, he actually saw Dr. Gamette for the first time on March 28th.

Mr. Karen: That is right.

Mr. Davis: There isn't any question about that. Things that can be established by records, I don't see that we need to take any time on.

The Court: Do you want to leave this in for identification?

Mr. Karen: I will leave it for identification. However, I would like to have the question of admissibility settled right now. I would like to introduce it in evidence.

The Court: Are you offering it?

Mr. Karen: Yes.

The Court: Let me see it.

(The document referred to was passed to the Court.)

The Court: If it is only for the purpose of refreshing [31] his recollection—

Mr. Karen: But my first purpose—

The Court: Is there any other purpose?

Mr. Karen: Yes, on the question of his being taken care of so far as the question is concerned. Dr. Gamette signed that letter stating what it says in there concerning the operation and expenses and care.

(Testimony of Martin R. DeVaney)

Mr. Davis: There is no question about that as far as I know. He was entitled to an operation.

Mr. Karen: We do have some evidence to offer that in this particular case this man was not offered the proper care that he should have been offered under the circumstances.

The Court: Is that any part of the case?

Mr. Karen: It is part of the case. It is part of the case going to his suffering and inconvenience and pain that he endured due to the care that was afforded him by the defendant.

Mr. Davis: The pleadings don't state any such issue.

The Court: No, they do not.

Mr. Davis: But I don't care. I won't be technical about it.

Mr. Karen: Leave it in for identification then. I will withdraw my offer at this time.

Q. Dr. Gamette stated to you then that he would make arrangements for the operation, is that right? [32]

A. That is right.

Q. Did you hear from Dr. Gamette 30 days later?

A. I never heard from Dr. Gamette from that time on.

Q. And that was in April '44?

A. As far as the arrangements for the operation, he never wrote to me at any time and made any arrangements.

The Court: Was this letter which counsel showed you, Exhibit No. 2 for identification, the only letter you had from Dr. Gamette?

The Witness: I believe that is the only one he ever wrote to me.

(Testimony of Martin R. DeVaney)

By Mr. Karen:

Q. What did you do after you returned from Dr. Gamette's office to San Bernardino?

A. I returned to work, if that is what you mean.

Q. Did you work? A. Yes, I worked.

Q. Did you work continuously after that time?

A. No, I didn't work continuously. Dr. Gamette told me that any time I didn't feel like working I didn't have to, and I didn't work continuously. I just worked a few days and then would be off.

Q. How many days were you off when you went to see Dr. Gamette?

A. Up until the time I went to Dr. Gamette? [33]

Q. During the time that you went to see Dr. Gamette.

A. During the time I went to see Dr. Gamette, I was off quite a bit of that month of April.

Q. Did you ever keep a record of your days of work and days off duty? A. Yes, sir.

(Counsel exhibiting document.)

By Mr. Karen:

Q. I show you what purports to be a time book. Is that what you kept your record of employment in?

A. That is what I kept my time in.

Q. Using that to refresh your memory, would you be able to tell the Court what days you were off work during the year of 1944, after January 1, 1944?

A. Yes, sir.

Q. When is the first time you were off work after January 21, 1944?

Mr. Davis: I think the book should be introduced in evidence.

(Testimony of Martin R. DeVaney)

The Court: The plaintiff is not entitled to introduce it in evidence. You are entitled to introduce it.

Mr. Davis: I have no objection to it.

The Court: All right. Do you wish to introduce it?

Mr. Karen: I would like to introduce it in evidence, your Honor, but it is rather complicated to get anything out [34] of it except probably the man who puts the notations in it. I would like to have him use it to refresh his memory as to these days off.

The Court: The book will be marked for identification as Plaintiff's Exhibit No. 3, and it will be marked in evidence if there is no objection to it.

(The record referred to was received in evidence and marked Plaintiff's Exhibit No. 3.)

By Mr. Karen:

Q. When was the first time you were off?

A. From February 16 to February 19, 1944.

Q. Where were you during that period of time?

A. It just shows off sick. I went down to—let's see, February. I didn't go to Dr. Nevin then. I am trying to answer it the best I can. It is hard to remember everything I did two years ago. That was the first time I was off after I was injured, February.

Q. When was the next time you were off?

The Court: Is that February 16, 17, 18 and 19, or just February 17 and 18?

The Witness: I had the wrong page here. The way I put this in here, I was off February 19 to the 22nd, including the 22nd, your Honor.

(Testimony of Martin R. DeVaney)

The Court: And including the 19th?

The Witness: 19, 20, 21 and 22; four days off in Febru- [35] ary.

The Court: All right.

By Mr. Karen:

Q. Then when was the next date?

A. Then I was off from March 16th to the 20th, and I worked the 21, 22, 23 and 24, and was off until the 30th.

Q. I just want the days off.

A. I was off from March 17th to the 30th; and four days in between I did work.

Q. Give us the actual dates you were off.

A. I was off between March 16th and 20th.

The Court: Inclusive?

The Witness: Inclusive; and March 25th to March 30th.

By Mr. Karen:

Q. When was the next time you were off?

A. Next I was off from April 12th to April 15th.

Q. Inclusive? A. Inclusive.

Q. All right.

A. That shows on the next page from March 12th to March 18th inclusive, instead of the 15th.

The Court: March 12th?

The Witness: March 12th to March 18th.

The Court: You just said March 16th to the 20th.

The Witness: Excuse me. It is the 20th. [36]

The Court: And then April 12th to April 18th?

The Witness: April 12th to April 18th.

(Testimony of Martin R. DeVaney)

By Mr. Karen:

Q. All right. After that?

A. After that, from June 27th to the 2nd of July.

Q. Next after that?

A. July 25th to the 31st of July.

In August, August 9th and 10th. Then I was off again in August, 17th and 18th, and I returned to work and was off from the 27th to the 31st of August.

Q. How about September 1944?

A. I am checking that now. I don't seem to show September in this book here.

Q. Did you work during the month of September?

A. I didn't work the early part of September. I was discharged from service at that time.

Q. What was the cause of your being discharged from service?

A. I lost too much time from my work and the Santa Fe train dispatcher discharged me from the service pending investigation.

Q. Do you know what his name was?

A. Mr. F. B. Grimm, assistant superintendent.

Q. Did you have a talk with him?

A. He called for an investigation and I met with Mr. [37] Grimm and my representation, and the Union Pacific representation, in this investigation, to find the cause why I lost all this time.

Q. Do you know what the result of this investigation was?

A. Mr. Grimm heard the testimony and he called Dr. Nevin for his satisfaction to find out if it was so, that my sickness was keeping me off from work so long. Dr. Nevin told him it was, and he returned me into the service.

(Testimony of Martin R. DeVaney)

Q. Did you work then after that?

A. I worked after that, just periodically, the same as I had been doing before.

Q. Do you recall how many days you were off in September during this investigation?

A. I lost six days for this investigation.

Q. That is in September?

A. Yes. Mr. Grimm said that I could go back to work pending the operation, and if I got fixed up he would allow me to go back to work.

Q. When was the next time you were off after the investigation, if at all?

A. The next time I was off was when I went down to see—that was in October—when I went down to see Dr. Gamette to ask him if he would give me a date so I could be operated on. [38]

Q. During all this period of time you had not heard from Dr. Gamette?

A. No, I had not heard from Dr. Gamette.

Q. All these layoffs from work, were they caused by your illness? A. By my illness.

Q. Were you suffering pain during this period of time?

A. I only could stay on my feet a short time. My abdomen was paining me and my testicles were giving me a lot of trouble, and giving me severe vomiting, headaches, cramps in my stomach. I could only stay on my feet so long and then I would have to lay off.

Q. These days that you did work, did you suffer pain?

A. Yes.

(Testimony of Martin R. DeVaney)

Q. Why did you keep on working?

A. I had gone to Dr. Nevin and told him how I felt and he said, "There is nothing else I can do for you until you get operated on."

The Court: Did you wear a truss of any kind?

The Witness: No, I couldn't stand anything like that because of the swollen condition of the abdomen and testicles. I tried it but it didn't work.

By Mr. Karen:

Q. Are you married, Mr. DeVaney?

A. Yes. [39]

Q. How many children do you have? A. Seven.

Q. How old are you? A. I am 40.

Q. During this period of time did you have your normal desire for sexual intercourse with your wife?

A. It couldn't very well be done.

Q. Did you notice that?

A. Well, it was just too much pain in the organs and it was swollen, and I didn't have no occasion to even desire anything like that.

Q. When you saw Dr. Gamette that fall, what did he say to you about the operation, if anything?

A. I told Dr. Gamette that I had been taken out of service by the Santa Fe Railway with the understanding that if I was operated on they would let me work on the joint track until the date of the operation.

Q. Just a minute. You mentioned the Santa Fe. Why did you say Santa Fe?

A. I was a Union Pacific employee and operated the Union Pacific train over the Santa Fe track. It is a joint track agreement. We are under the Santa Fe management

(Testimony of Martin R. DeVaney)

along with the Union Pacific management. We operate under both company rules.

Q. And they were the ones, that is, the Santa Fe was [40] the company that was complaining because of your being off from work?

A. They didn't know anything about it until the investigation.

Q. Go ahead then.

A. Then I explained this to Dr. Gamette and he took the telephone and called the Good Samaritan Hospital—this was in October—and then he said they would give me an operation date in one month, which would be November 8th.

Q. Then you went back home?

A. I went back home.

Q. Did you work after that examination?

A. Just off and on. I didn't work steady.

Q. When were you supposed to report then for the operation?

A. Dr. Gamette told me to be there at the Good Samaritan Hospital the day of the 8th of November.

Q. 1944? A. 1944.

Q. Did you make a request for transportation to Los Angeles?

A. I wrote out a leave of absence to the crew dispatcher of the Union Pacific and to the superintendent of the Union Pacific and to the Santa Fe, and I asked them to have my transportation there. I had to do that, make out my own [41] leave of absence for that purpose, being out of the service for sickness, and I told them the cause and that I wanted the transportation for my wife and myself to go to the hospital on November 8th.

(Testimony of Martin R. DeVaney)

Q. Did you secure that transportation?

A. No, sir, I never heard from anybody.

Q. What happened on November 8th?

A. Well, usually it took a while to get things like that, and on November 8th I waited for my transportation until pretty nearly noon, and the Union Pacific transportation didn't arrive for me so I went up and asked Mr. Grimm of the Santa Fe if he would allow me transportation to go to the hospital, and he sent my wife and I down on the Pacific Electric bus.

Q. You came down to Los Angeles on a bus?

A. Yes, sir.

Q. Did you report to the hospital?

A. I reported to the hospital around 9:30, 10:00 o'clock of November 8th.

Q. That is in the evening? A. Yes, sir.

Q. What happened there?

A. When I got there I found out that my operation date had been canceled, the doctor didn't think I was going to show up. [42]

Q. What did you do?

A. I told the nurse that I had suffered enough as it was and that I was going to stay in that place until they took care of me, so she called up the doctor and told him what my demands were, that I insisted on being taken care of, and he made arrangements at 11:00 o'clock that night for the doctor to give me an anesthetic, and he made an appointment for the next morning at 8:00 o'clock. That was all done at 11:00 o'clock that night. It took about an hour to get Dr. Gamette, and he called several doctors to find out who could give me an anesthetic.

(Testimony of Martin R. DeVaney)

Q. How much rest did you have before the operation?

A. I worked 16 hours the day before that, and that morning I came right down, that day I wasted all day getting to the hospital; then they worked on me until 2:00 o'clock in the morning, and I was up at 7:00 o'clock for a pill, and then to the operating room.

Q. You were operated on on November 9th, is that right?

A. The morning of the 9th.

Q. How long did you stay in the hospital?

A. About 22 to 24 days, something of that sort.

Q. And you were returned to San Bernardino on what date?

A. I didn't—

Q. Just give me the date you returned to San Bernardino. [43]

A. I didn't return to San Bernardino until December 5th.

Q. We will go back then.

What date did you leave the hospital?

A. I don't exactly remember the date I left the hospital. It was something around 20, 24 days that I was there.

Q. Twenty-four days in the hospital?

A. Something like that, as far as I can remember.

Q. Did you secure transportation from the hospital to your home?

A. I asked Dr. Gamette if they could arrange for my transportation home because I had no way of getting home when he released me, and I would like to have my wife and her sister come down from San Bernardino to get me.

(Testimony of Martin R. DeVaney)

Q. What did he say?

A. He didn't say anything about it. He said that would be taken care of later.

Q. Did he do that?

A. No, I didn't get any transportation.

Q. Who got you?

A. Nobody gave me transportation to go home. I called Mr. Healey of the Union Pacific and he said he didn't have no authority to give me any transportation home, so I didn't know who to get it from, so I called my mother and father from Pomona and they took me out of the hospital. [44]

Q. Where did they take you?

A. To their home.

Q. Did you walk?

A. I couldn't walk. I was in a wheel chair. They helped me in the car.

Q. How long were you confined then after that?

A. Well, I couldn't walk for about a week. I stayed at my mother's home .

Q. When was the next time you returned to work?

A. I didn't return to work until about March 16th.

Q. 1945? A. 1945.

Q. Mr. DeVaney, do you know just about how many days you were off work prior to the operation and after the operation, the total number of days?

A. I checked with my own time-book and I know the days. It was 47 days before I was operated on that I lost, and 130 days afterwards.

Q. Making a total of 177 days?

A. 177 days lost.

(Testimony of Martin R. DeVaney)

Q. What was your rate of compensation on this particular job?

A. That rate was—they paid us \$8.24 for 100 miles. The jobs I was on was 16 hours a day practically. They just about run that way. That would be 250 miles daily at \$8.24 a [45] hundred.

Q. Roughly what would that amount to a day?

A. About \$20 a day.

The Court: That is every day or every other day?

The Witness: That is daily. Some days it runs a little over, some days a little under.

By Mr. Karen:

Q. Then 177 days multiplied by \$20 a day—

A. 177 days at \$20.

Q. —making a total of \$3540 that you estimate you lost in wages? A. Yes.

Q. Now these medical expenses, were they taken care of?

A. They were taken care of by an insurance policy that I keep.

The Court: Private, personal?

The Witness: No, this is a Union Pacific group insurance.

The Court: I mean, you pay premiums?

The Witness: I pay a premium; yes.

By Mr. Karen:

Q. How much premium did you pay?

A. It costs \$1.65 a month on the average.

Q. Then outside of this dentist that you went to, you have not had to pay out any doctor bills?

A. No, that was through my insurance. [46]

(Testimony of Martin R. DeVaney)

Q. You didn't see any private doctors of your own, did you? A. No.

Q. Now, Mr. DeVaney, did you ever make out any accident reports? A. Yes, sir.

Q. Do you recall when you made out the first accident report? A. Right after the accident.

Q. When?

A. After I seen Dr. Ballachey, I made a report out and sent it in to Mr. Taylor's office.

Q. Do you recall what date that was?

A. I got hurt on the 21st, and it was about the 22nd or 23rd, possibly the 24th, that that accident report was made out and sent in.

Q. What type of report was it? Did you write it, or what?

A. Yes, I wrote it. They have got a form they call 1124, something like that, and I wrote and told the number of cars on the train, what happened, and the whole thing, put it in an envelope and mailed it in to the assistant superintendent.

Q. Where? A. In Los Angeles. [47]

Q. Do you recall who that was?

A. That is Mr. Taylor, George W. Taylor. That was after I saw Dr. Ballachey.

Mr. Karen: Your Honor, I subpoenaed from the Pacific Company all accident reports made by Mr. DeVaney and all witnesses, all crew men on that train. I don't know if they are here in court now, but if they are I would like to see them. The particular report that I am referring to now in my questioning of Mr. DeVaney is among those that I subpoenaed. I don't know exactly how to go about it. Mr. Davis said I could.

(Testimony of Martin R. DeVaney)

Mr. Davis: I have no desire to be technical, but the first accident report we have from Mr. DeVaney is dated March 4, 1944.

Mr. Karen: Is that the first one you have as to date?

Mr. Davis: Yes, sir.

Mr. Karen: You have none before March 4th?

Mr. Davis: No.

Mr. Karen: I will go on with my questioning then.

Q. What did you state in this report that you mentioned that you made out a few days after the accident, if you recall?

A. Just that I had fallen from the train and the particulars of the accident and where I was injured and what I had done about it. [48]

Q. Did you make it out in one piece of paper, or were there copies?

A. You make them out in three copies.

Q. That is called Form 1124?

Mr. Davis: Form 2611.

The Witness: Form 2611; that's right.

By Mr. Karen:

Q. Form 2611? A. Yes, sir.

Q. Is that the only time you made out a Form 2611?

A. I made out—there were several copies made out after that. That was the first one I made out.

Q. Have you a copy of that in your possession?

A. No, I haven't. I had a copy but I moved and lost those copies.

Q. Did you request anybody to send you a copy of the report you made?

A. I asked Mr. Taylor if he would send me a copy of the report so I could review it, and Mr. Taylor acknowl-

(Testimony of Martin R. DeVaney)

edged that they had it, but he didn't say that he had it. He said he had placed them in other departments.

Q. In what manner did Mr. Taylor acknowledge that he had this report?

A. I told him that I would like to have a copy of the report. Three of them were made out. The first one was sent [49] in January and one around May when I talked to the claim agent, and another one that we were requested to make out, the whole crew, in March.

Q. Before we go into that, I want to talk about this report that you said that you made out a couple of days after the accident and which you asked Mr. Taylor for and you say he acknowledged that he had the report but that he had sent it on to other offices; is that right?

A. He wrote and told me, but he said he had sent it to other departments.

Mr. Davis: Just a minute. I object to counsel testifying.

Mr. Karen: He just testified to that. I was repeating what he said.

Mr. Davis: I didn't so understand it.

As far as I know, there isn't any report of that early a date. Now if the witness is speaking of writing to Mr. Taylor about that report, then I think the best evidence is the letter or the copy of the letter, and I will object to any further testimony along this line.

Mr. Karen: That is what I am looking for now.

The Court: Did you subpoena Mr. Taylor to produce any letters that he received?

Mr. Karen: No, I didn't.

The Court: Is Mr. Taylor an employee of the Union Paci- [50] fic?

(Testimony of Martin R. DeVaney)

Mr. Karen: I believe he is.

Mr. Davis: Yes, sir.

The Court: Do you have any letters?

Mr. Davis: No. There wasn't any such letter, your Honor.

The Court: You have no letters at all from the plaintiff?

Mr. Davis: Not as to this period of time.

The Court: That is, not prior to this report of March?

Mr. Davis: That is right, sir.

The Court: You made out a report on the form and mailed it in to Mr. Taylor?

The Witness: Yes, that is right.

The Court: Did you leave it for somebody else to mail?

The Witness: No. I put it in a company envelope and addressed it to Mr. Taylor. That is required, any time we get hurt.

The Court: Where did you leave that?

The Witness: I put it in the company mail and it is delivered in.

The Court: Company mail where?

The Witness: San Bernardino, in the mailbox.

The Court: In the station?

The Witness: Yes, the same as our time reports and time [51] slips.

The Court: There is a special company mailbox there?

The Witness: Yes, sir.

The Court: You do not have to put any postage on it?

(Testimony of Martin R. DeVaney)

The Witness: No, sir.

The Court: And that is what you did with the first report?

The Witness: Yes, sir; that is right.

Mr. Davis: This letter that counsel has is probably in Mr. Taylor's file. I don't have it. But I have no objection to it being presented.

The Court: You have no objection to the use of a copy?

Mr. Karen: This is the original letter, your Honor.

Mr. Davis: This is the original letter that Mr. Taylor sent to Mr. DeVaney, so I have no objection to that.

The Court: All right.

By Mr. Karen:

Q. I will show you what purports to be a letter dated February 13, 1946. Do you recall that letter?

A. Yes, I do.

The Court: Did you receive that in the mail?

The Witness: I received that in the mail.

The Court: On or about the date it bears?

The Witness: On or about the date it bears, your Honor.

Mr. Karen: I would like to submit this in evidence as [52] plaintiff's exhibit next in order.

The Clerk: No. 4.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

[PLAINTIFF'S EXHIBIT NO. 4]

Los Angeles, Feb. 13th, 1946

582-D

Mr. M. R. Devaney,
1219 West 10th Street,
San Bernardino, California.

(cc—Mr. G. C. Fish)

Referring to your letter of Feb. 8th requesting that I return to you a copy of accident reports made out by you concerning injuries to you occurring on Jan. 23rd and May 20th:

These reports were forwarded at the time they were received to other departments and am unable to comply with your request.

G W Taylor

G. W. Taylor

Case No. 4876-PH. DeVaney vs. U. P. R. R. Plfs. Exhibit No. 4. Date May 7, 1946. No. 4 Identification. Date May 7, 1946. No. 4 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 12, 1946. Paul P. O'Brien, Clerk.

(Testimony of Martin R. DeVaney)

Mr. Karen: I would like to use it now, if I may, your Honor.

(The document referred to was passed to counsel.)

Mr. Karen: Your Honor, is it better that I read this letter or have the witness read it? It doesn't make any difference to me.

The Court: I will read it.

(The document referred to was passed to the Court.)

By Mr. Karen:

Q. This letter that you received from Mr. Taylor, what does that refer to?

A. It is his answer in regard to the copy of the accident report I sent in to him. I asked him for it.

Q. What accident report were you referring to in the letter that you wrote to him and to which this was an answer?

A. Usually when an accident happens, the accident reports are made up by the employee, and he is entitled to a copy for his own file, or for his own information. There was something I wanted to look at and I asked him if I could have a copy of the reports that I had mailed in to him so that I could refer to it myself, and that was the answer he wrote [53] back, that it had been given around to the other departments of the company.

Q. After that report that you mentioned you made out a few days after the accident, did you make out any other reports after that?

A. No, that was all I made out except the March report. That was the second one. I made the first one out after I got hurt, then there was another one requested

(Testimony of Martin R. DeVaney)

by the company. Mr. Taylor wrote back and wanted the whole crew to make out an accident report in March, including myself.

Q. Did you do that? A. Yes, I did.

Q. Did you ever have a discussion at the time of the accident with conductor Brown?

A. Other than I reported to him that I was hurt and was going to go over to the caboose, and I asked him if he wanted to send in a report, and his answer was, "You better see the doctor first before we send in any report at all." That is so he would know what to put on his report.

Q. Do you know a Mr. Ford? A. Yes, sir.

Q. Who is he?

A. He is a claim agent for the Union Pacific.

Q. Did you ever have a talk with him about this accident? [54]

A. He stopped at my house and asked my wife to bring me down to the Santa Fe freight house depot when I returned to work, and that was sometime around about three months after I got hurt. He wanted to make out a report of it and talked to me.

Q. What is his job?

A. He is a claim agent for the company.

Q. Did you give him a report?

A. He sat there in the room and asked me a few questions about it, and I asked him how it was going to be taken care of, and all that, as far as my family was concerned, and he said—

Mr. Davis: Well, now, just a minute. I object to that. It is hearsay, I should think, unless there is some admission perhaps.

The Court: I don't know.

(Testimony of Martin R. DeVaney)

Mr. Davis: I don't know either.

The Court: The witness started to say "he said."

By Mr. Karen:

Q. Go ahead. What did he say?

A. In other words, Mr. Ford said he merely wanted to take a picture of the accident, and I asked him how I would be able to be financed while I was in the hospital, and he said that would all be taken care of after I got out. He said, "We will fix you up first and we will take care of that [55] after the operation."

Q. At this time that you were off from work, did you receive compensation?

A. No, sir.

Q. How did you—

The Court: Just a moment. Do you mean did he receive pay?

Mr. Karen: I am sorry. That is right.

The Witness: No, sir.

By Mr. Karen:

Q. Have you ever received any compensation?

A. No, sir.

The Court: In speaking of compensation, are you using it in the legal sense now?

Mr. Karen: No, I meant pay.

The Court: Such as Workmen's Compensation?

Mr. Karen: No. In my first question I was referring to his daily pay.

The Court: Daily pay?

Mr. Karen: Yes, that \$20 a day.

Q. You didn't receive that money at all at any time while you were off?

A. No, sir.

(Testimony of Martin R. DeVaney)

The Court: Did you ever receive any money?

The Witness: I never received a penny. [56]

The Court: For the time you were off?

The Witness: From the time I was off, from the time I got hurt.

By Mr. Karen:

Q. Did you experience any difficulty in taking care of your family?

Mr. Davis: If the Court please, I object to that.

The Witness: I did.

The Court: That goes without saying, I think. If a man doesn't get money, he doesn't get money.

By Mr. Karen:

Q. Do you know a Mr. Clark? A. Yes, sir.

Q. Is that the gentleman sitting here, the second gentleman sitting there? A. Yes, sir.

Q. Did you ever have a talk with him?

A. Yes, sir. I talked to him in December after I left the hospital.

Q. What was that conversation about?

A. I referred to Mr. Ford's statement about what the compensation would be, in other words, there would be something given me for the time I lost after I got out of the hospital. Mr. Clark said, "I don't have your papers on file, but I will send back to Omaha to get them." That was in [57] December.

Q. Did you ever talk to Mr. Clark again?

A. I talked to him later on and he said he had nothing to tell me; so far he had received no word or had no

(Testimony of Martin R. DeVaney)

answer for me at that time. That was later on in January. And I told him about my condition at that time, what I was undertaking.

Q. Do you know Mr. Aaronson?

A. Yes, I know Mr. Aaronson.

Q. Who is he?

A. I met Mr. Aaronson at Yermo and he took statements—he is a claim agent in Mr. Clark's office—he took statements from myself and said he wanted to get more details, or he would get the details from Mr. Clark and they were going to work on it together.

Q. In other words, you made out a personal report a few days after the accident in January 1944, you made out another report around March 4, 1944, then a Mr. Ford made out a report; is that right?

A. Mr. Ford must have been sent from the company or something. I don't know.

Q. I asked you, did he make out a report?

A. Yes, I made out a report to Mr. Ford.

Q. Then Mr. Aaronson made out a report?

A. Mr. Aaronson made out a report. Mr. Ford and Mr. [58] Aaronson typed theirs out. I didn't make no handwriting report to them at all. It was all verbal.

Q. They asked you questions and you talked to them?

A. They asked me questions and I answered them, and they said, "Is that near enough," and I would say "Yes," and they would type that out.

Mr. Karen: Do you have all those reports, counsel?

Mr. Davis: Certainly.

Mr. Karen: Those of Mr. Ford and Mr. Aaronson also?

Mr. Davis: Yes.

(Testimony of Martin R. DeVaney)

Mr. Karen: I would like to look at them. I subpoenaed them.

The Court: Any objection?

Mr. Davis: On the assumption that I may introduce them if counsel looks at them and chooses not to introduce them. I understand that is the rule in the Federal Courts.

The Court: I can't tell you in advance what I will rule when I come to the offer of them in evidence, but I think counsel has a right to see them.

(The documents referred to were passed to counsel.)

By Mr. Karen:

Q. Did you sign any of these reports?

A. I was asked to sign the one Mr. Ford made out, and I signed it.

The Court: You said you didn't go back to work until [59] March 1945?

The Witness: Yes, your Honor.

The Court: And you got out of the hospital in the latter part of November?

The Witness: Yes, your Honor.

The Court: 1944?

The Witness: Yes. The doctors wanted me to take three months after the operation.

The Court: What doctors?

The Witness: Dr. Gamette.

The Court: Dr. Gamette?

The Witness: Dr. Gamette, chief surgeon for the Union Pacific.

The Court: Told you to stay off three months?

The Witness: That it would take three months. Then when I went back to work I had to take more time off.

(Testimony of Martin R. DeVaney)

The Court: You had to take more time off?

The Witness: I took another week off. I was too weak yet.

The Court: Does the California Workmen's Compensation Act apply to railroads?

Mr. Davis: No, sir. This is brought under the Federal Employees' Liability Act.

The Court: Isn't there workmen's compensation provided in that? [60]

Mr. Davis: No, sir.

Mr. Karen: No, your Honor. It has no bearing at all. That is the state unemployment act.

The Court: What I am trying to get at is, is there any means provided for compensation such as the California Workmen's Compensation Act?

Mr. Karen: In the state or federal government? Under the Federal act it does.

The Court: For railroad employees?

Mr. Karen: Under the Federal act it provides for damages, the same as any ordinary accident. I mean, there is no particular rate of compensation such as there is under a workmen's compensation act.

Isn't that right?

Mr. Davis: That is true, your Honor. I guess most of these cases have been brought in the state courts so that it is an unusual procedure to be here.

The theory of the act is that the employee, in order to recover, must prove negligence, and that negligence was the proximate cause of injury. Then contributory negligence is a partial defense, not a complete defense.

The Court: What sections of Title 49 are applicable here?

(Testimony of Martin R. DeVaney)

Mr. Davis: It is Title 45, Sections 51 to 57, or 59, I guess it goes to. [61]

The Court: Title 45 and not Title 49?

Mr. Davis: Title 45; yes, sir.

By Mr. Karen:

Q. Mr. DeVaney, do you recall what you said in the report of March 4, 1944?

A. No, I don't recall word for word any more than what I wrote down. I don't recall even what I wrote down.

Mr. Karen: I think probably the best way to do this would be to let you introduce it and let you question him on it and then I can take it on redirect again.

Mr. Davis: All right.

Mr. Karen: That would be the best way. I could do it this way but it doesn't make any difference.

Mr. Davis: I haven't any objection to their going into evidence.

Mr. Karen: I think I would have a little more leeway if I let you do it.

Mr. Davis: All right.

By Mr. Karen:

Q. Mr. DeVaney, at the time that you fell off the car did you make any cry, let out a cry, or holler in any way at all? A. Not that I recall.

Q. You stated you worked for railroads a long period of time, since 1926. [62] A. Yes.

Q. Can you tell the Court just how you personally felt concerning injuries and your job?

Mr. Davis: If the Court please, I object to that.

Mr. Karen: I believe this is very important, your Honor.

(Testimony of Martin R. DeVaney)

The Court: It might be important, but it might not be admissible.

Mr. Karen: I believe it is also material.

Maybe if you don't want me to talk in front of the witness, there is no jury here—

The Court: Certainly. Tell me how in the world anything like that can be material.

Mr. Karen: Here is the thing: It is common knowledge that these men working on a railroad, I mean when they lose a day's work or if they complain about anything, and they are laid off a day, or fired, with the possibility that they might be fired or they lose their wages, over a period of time these men become calloused and hardened to the fact that they have got to stay on the job. It is something like being in a military service. They cannot do a thing without a card or a slip. They can't refuse to go to work unless they get a letter from the doctor. They just have to go to work.

Now I want to ask this witness, the plaintiff in this case, just how that comes about. I think it is material anticipating the admission in evidence of certain documents [63] that will be claimed to have been signed by Mr. DeVaney after the accident happened. I can ask him that after the admission of the documents, I suppose.

The Court: I don't think you can ask him that now. I don't know whether you can even ask him that afterwards.

Mr. Karen: Well, certainly I think maybe the best thing to do is to wait until afterwards. I think that will be clearer then, the picture will be clearer.

The Court: The objection is sustained to your question.

(Testimony of Martin R. DeVaney)

By Mr. Karen:

Q. How do you feel now, Mr. DeVaney?

The Court: How does he feel about what?

Mr. Karen: Personally.

The Court: How does he feel physically?

Mr. Karen: Physically today.

The Witness: I feel fair, I guess. I never got over the nervous shock of that fall, and there seems to be a little slight bruise on the left testicle yet that bothers me occasionally.

By Mr. Karen:

Q. When did you have your last physical examination?

A. Last week.

Q. By whom?

A. By the chief surgeon, Dr. Gamette.

Q. Did he observe this left testicle? [64]

A. I told him about it. I am afraid of it and I am afraid to cut loose yet, because it is only a year ago since I was operated on. I am sensitive to it.

Q. Did he examine you? A. He examined me.

The Court: Did he examine your testicle?

The Witness: He did, your Honor.

By Mr. Karen:

Q. Since the operation, have you been able to engage in normal sexual intercourse with your wife?

A. Not without the fear of having my testicle hurt and give me trouble all over again. It was bruised.

The Court: Just a minute now.

Have you had sexual intercourse with your wife?

The Witness: Yes, sir.

(Testimony of Martin R. DeVaney)

By Mr. Karen:

Q. Was it normal?

The Court: How can a judge decide what is normal sexual intercourse between some man and his wife?

Mr. Karen: He can say whether or not there was any particular pain.

The Witness: It was painful at first after the operation, but gradually it hasn't been so severe.

By Mr. Karen:

Q. Are you working now, Mr. DeVaney? [65]

A. Yes.

Q. What type of work are you doing now?

A. Brakeman, same as before.

The Court: Over Cajon Pass?

The Witness: No, sir. I am in Los Angeles now on the extra board. We still operate over Cajon Pass the same as before.

Mr. Karen: I have no further questions at this time.

Cross-Examination

By Mr. Davis:

Q. I will show you a Form 2611, Mr. DeVaney—

The Court: Do you have a series of them?

Mr. Davis: No, just one Form 2611, your Honor.

The Court: I thought if you had a series of documents you might have the Clerk mark them now for identification and that will keep the record straight.

Mr. Davis: All right.

The Court: Are there three of them?

Mr. Davis: No, this is one exhibit.

The Clerk: The Form 2611 is Defendant's Exhibit A, and the other is Defendant's Exhibit B.

(Testimony of Martin R. DeVaney)

(The documents referred to were marked Defendant's Exhibits A and B respectively for identification.)

By Mr. Davis:

Q. I will show you Defendant's Exhibit A for identification, a Form 2611, and ask you if that is made out in your handwriting.

A. Yes, that is my handwriting.

Q. I will show the back side of the form and ask you if the handwriting on that side is yours.

A. Yes, sir; that is my handwriting.

Q. And it is dated March 4, 1944. Is that the proper date that you made that out? A. Yes.

Q. Now I call your attention to question 26, which states:

"Remarks: State fully any further information you can. I asked the conductor if I should make a report of the accident when it occurred. He advised not unless I was injured. After about three weeks my left side of my abdomen began to swell and I treated it with liniment after which the swelling left but the side bothers me at times since."

I understand that you wrote that yourself on March 4th, is that correct? A. That is right.

Q. Now will you explain to me, if it is true, as you have told us this morning, that you noticed in the shower the morning of the accident when you got home a swelling and a redness, then what explanation have you for making that [67] statement in the Form 2611?

A. Well, I already had gone to the doctor and I was examined by him and he knew my condition.

(Testimony of Martin R. DeVaney)

Q. Now in that Form 2611, you say that three weeks after the accident you first noticed a swelling. How do you explain that statement in view of your testimony this morning that you noticed it the morning of January 21st when you took a shower?

A. The swelling was still there from the time I got hurt. It just kept getting worse and worse as time went on.

Q. That is the only explanation you care to make?

A. Yes, sir. It started right out from the very fall, the beginning, and afterwards it just kept getting worse until I had to lose time over it. It was very difficult for me to get around.

Mr. Karen: I can't hear you, Mr. DeVaney. Speak up.

The Witness: The injury got more violent as it went on, that is, the pain and all.

By Mr. Davis:

Q. You stated this morning that you notice the swelling and the redness in your groin on the morning after you got home when you were taking a shower, is that correct? A. That is right.

Q. But as I understand your statement here on March 4th, you say: "After about three weeks my left side—" [68]

Mr. Karen: I object to that, your Honor. It has been asked and answered. I think Mr. DeVaney has answered the question. Now he is asking him the same thing over again.

The Court: I don't know whether he is or not. He hasn't finished his question.

(Testimony of Martin R. DeVaney)

Mr. Karen: Well, he is going to read it from the report.

The Court: I don't know what he is going to do.

Mr. Karen: I will withdraw the objection at this time and make it later.

By Mr. Davis:

Q. On the Form 2611 you say: "After about three weeks—after about three weeks—my left side of my abdomen began to swell—"

Mr. Karen: Does that have "after about three weeks" twice in there?

Mr. Davis: No.

Mr. Karen: You were just emphasizing it?

Mr. Davis: That is right.

Mr. Karen: I still object to the question. It has been asked and answered.

Mr. Davis: I don't believe I finished the question yet.

The Court: Let's start over again on your question.

By Mr. Davis:

Q. As I understood your testimony this morning, you noticed a swelling in your left groin when you were taking a [69] shower the morning when you got home.

A. Yes.

Q. Now on this Form 2611 you say: "After about three weeks it began to swell." Now I am saying, how do you reconcile those two statements.

A. The swelling already was there, and the swelling just got more severe.

(Testimony of Martin R. DeVaney)

Q. Now I will show you Defendant's Exhibit B for identification and ask you if that is the statement you referred to taken by Mr. Ford.

A. Yes, that is the one. He typed it out. The only way I can identify it is if I signed it.

Q. You will see at the bottom of each page it is signed "Martin R. DeVaney." Is that your handwriting?

A. I know my wife signed it at the same time.

Mr. Karen: Speak up.

The Witness: This is the report taken by Mr. Ford.

By Mr. Davis:

Q. Did you read that report before you signed it?

A. No, sir, I didn't. I just glanced at it and signed it.

Q. Now I call your attention to the second paragraph on page 2 of the report, as follows:

"I did not notice any pain in this area afterward until about two or three weeks later I noticed, [70] after cohabitation with my wife, I noticed quite a severe pain and my left testicle swelled up to about the size of an orange. That is the first time I noticed any pain in this region."

You so stated to Mr. Ford on April 22, 1944, did you not?

A. Well, if I had told them any more than the doctor already knew—

Q. Did you so state?

The Court: Did you state that to Mr. Ford?

The Witness: I stated that; yes.

The Court: All right.

(Testimony of Martin R. DeVaney)

By Mr. Davis:

Q. Now what is your explanation for it?

A. Well, there must have been a question asked to me in order to have an answer like that in his statement.

Q. I am asking if you have any explanation as to the difference between your statement to Mr. Ford on April 22, 1944, and your testimony here this morning.

A. I am thinking of your answer. I am just trying to straighten it out in my mind. I seem to be confused over your question. There is something here I can't give you the correct answer to.

Q. As I understand the statement that you made to Mr. Ford, you told him that you didn't notice any pain in the region of your left groin until two or three weeks after this [71] fall from the flatcar. Now I understood this morning that you said you noticed pain immediately, that you had a stabbing sensation at the time you fell from the car; that you got sick in the night and vomited some coffee, and you had pain constantly in that region all the time, and then when you took a shower the next morning you saw that it was swollen and red and you went to Dr. Beellachey a couple of days later.

Now have you any explanation to make as to the difference between the statement you made to Mr. Ford and this testimony that you have given this morning?

A. Other than the injury continued to show greater signs of damage and to my health. The thing was, I was hurt and they knew about it, and the swelling was there and it continued to stay there, and the abrasion was there, the hernia was puffing out and kept getting worse. I told

(Testimony of Martin R. DeVaney)

them just as I am answering you here, after three weeks it got very severe, it got worse.

Q. Did you ever suffer any pain in the region of the left groin prior to two or three weeks after the accident?

A. I suffered right from the beginning of the fall.

Mr. Davis: May I introduce these in evidence then, your Honor?

Mr. Karen: No objection.

The Court: Admitted. [72]

(The documents referred to were received in evidence and marked Defendant's Exhibits A and B respectively.)

[DEFENDANT'S EXHIBIT A]

REPORT OF PERSONAL INJURY TO EMPLOYEES, PASSENGERS OR OTHER PERSONS.

Instructions.—A separate blank must be filled out for each person injured whether the injury is severe or slight, by each employe present. Every Question That Would Pertain to the Accident Reported Must Be Answered Fully. If blank spaces are insufficient for full statement, answer further in form of letter and attach hereto.

1. Name, residence (street and number) and P. O. address of person injured. Martin R. DeVaney
1105 La Junta St. San Bernardino Calif.
2. Age. 38 Occupation. Brakeman
3. A. Married or single. Married If married, name and residence of wife or husband. Hilda DeVaney
1105 La Junta St. San Bernardino Calif.

(Defendant's Exhibit A)

4. A. Employe, passenger, traveler on highway or trespasser? Employe If employe, how long in service of this Company, and in what capacity? 17 months Brakeman

* * * * *

7. A. Date, hour (day or night), and exact point where accident occurred. Jan 21 1944 East Switch of Westward siding. About 10 25 pm. Cajon

- B. If at night, was it very dark? Yes Kind of weather. Cloudy

* * * * *

- G. On main or side track? Main track Curve or Straight line? (State whether curve to right or left.) Straight Up or down grade? Down

8. A. Train No. Ex 5097 West Conductor, yardmaster or foreman R. G. Brown

- B. Engine No. 5097 Engineer. C. P. Sturgeon Fireman. A. J. Dalmolin

- C. * * * Head Brakeman. R. R. Hopkins. Rear Brakeman and ~~Porter~~. K. D. Anderson

* * * * *

- E. No. cars in train. 29 cars No. loads 28 cars No. cars with air brakes. 29 cars In what direction was train moving? West

- F. Were all air brakes connected? If not, state why. Yes

* * * * *

(Defendant's Exhibit A)

H. Speed of engine or cars at time of accident. 8 miles per hour * * * If backing up, who was on rear end? Going—foreward

9. State your location with reference to point of accident. Standing on flat car. (South Side)

* * * * *

10. What was injured person doing at time accident occurred? Walking west and walking on a flat car.

11. Give full particulars of cause of accident. While walking to the end of flat car, a broken wire which was nailed to surface of car, caught the leg of my overalls and cause me to trip and fall off the car to the ground landing on my chest and stomach. The flat car was loaded with Army Trucks and I was walking by them when the accident occurred.

12. A. Was person injured while making coupling or uncoupling? No * * *

* * * * *

14. A. Was there any defect in track, bridges, building, rolling stock, machinery, tools or other appliances, that caused, or may have assisted in causing the injury? If so, state fully. Heavy wire used to support Trucks loaded on flat car were broken and dangling and impossible to see at night with lantern light as to their position.

(Defendant's Exhibit A)

- B. If there was a defect, how long had same existed?
I don't know. Had same been reported? Had not
been noticed before as broken. * * *
14. C. Did injured person know of defects? No
* * * * *
15. State what precautions were taken, and by whom,
to prevent the accident. My lighted lantern was
used to light the direction while working
16. A. In your opinion what further precautions could
have been taken? None
- B. How many persons were assisting in the work?
None
- C. Was there sufficient assistance to do the work
safely? Yes
17. Was the engine properly handled? Yes. Was
the engine equipped with the automatic bell
ringer? Yes
18. A. What signals or warnings were given, and by
whom and in what way? None
* * * * *
20. What distance did engine or cars run after the
accident occurred? About ten or fifteen cars.
21. What does injured person say as to extent of his
injuries? No injurie noticed until about three
weeks after accident
22. A. What does injured person say was cause of ac-
cident? Broken wire supports fastened from
Army Truck wheels to surface of flat car floor.

(Defendant's Exhibit A)

B. In whose hearing was statement made? I reported the accident to the Conductor at the time it happened and he asked me if I was hurt, I told him no injury was noticable.

23. Was injured person insane, intoxicated, blind or deaf? No

* * * * *

26. Remarks: State fully any further information you can. I asked the conductor if I should make a report of the accident when it occured, he advised not unless I was injured. After about three weeks my left side of my abdomen began to swell and I treated it with liniment after which the swelling left but the side bothers me at times since.

(Sign here) Martin R. De Vaney

(Occupation) Brakeman

(Address) 1105 La Junta St. San Bernardino Calif.
Month. Day of Month.

(Date) March 4 1944

* * * * *

Case No. 4876-PH. DeVaney vs. U. P. Deft. Exhibit A. Date May 7, 1946. No. A Identification. Date May 7, 1946. No. A in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 12, 1946. Paul P. O'Brien, Clerk.

(Defendant's Exhibit B)

and I didn't get up right away. Anderson, rear brakeman, was the first one to see me and he saw me sitting ~~to~~ on the ground there and asked what was the matter and told him I fell off of that flat car up ahead. It was dark and Hopkins was the only one who might have seen me fall. It was dark but I was carrying an electric lantern as I went over this car and it was lighted at all times so that I could see where I was going. This broken guy wire was one of the wires crossed from the rear of the forward truck to the stake pocket hole about opposite the nearest wheel of the next truck. This wire that I fell over was broken and dangling. Broken off right at the stake pocket. There were four or five wires in this stake pocket and they were all rusted and they are not visible at night. You can because we expect to find things like that and look for them but I didn't see this wire until I had fallen over it. I don't know if I could have seen it if I had looked or not because we went back afterward and wrapped this piece of wire up around the other wires to get it out of the road so it wouldn't hit someone in the eye. All these wires, except the one which had broken, were holding the load.

I have read the above and it is true.

Martin R. DeVaney, San Bernardino, Calif., April 22, 1944.

Witness: Mrs. Martin R. DeVaney

C. T. Foster

D. J. Ford

(Defendant's Exhibit B)

Statement of Martin R. DeVaney, Page Two.

This broken wire was rolled up so it stuck up above the other wires. They way they were fastened, they were twisted up real tight beneath the stake pocket and this one wire had broken and the spring in the wire had caused it to curl up so it was sticking above the other wires.

When I fell I did not notice any pain in the region of my groin to indicate I had received a hernia at the time. I had lost my breath and was a little shaky at the moment, thinking I was lucky I didn't go under, and I did not notice any pain in this area afterward until about two or three weeks later I noticed, after cohabitation with my wife, I noticed quite a severe pain and my left testicle swelled up to about the size of an orange. That is the first time I noticed any pain in this region. I went to Dr. Nevin then the next day to see what could have caused this hernia and I told him about it. I wish to correct this statement. Dr. Ballachey in Yermo was the one I went to in Yermo. I told the other men on the crew about this the next day after I first noticed this pain, and went to Doctor Ballachey when I got to Yermo. I explained to him that the abdominal wall had swollen and a tight cord down through my left testicle that bothered me when I walked. He told me it looked to him like it could be a hernia and he wasn't definite about it and I went back to him a second time and he was examining me for Group insurance the second time I went to him and he said he thought I had a hernia and sent me to Dr. Gammette. I have since gone to Dr. Gamette and he said it is a strangulated hernia. He didn't say what kind it was but said with this type I shouldn't go too far away

(Defendant's Exhibit B)

from the home terminal, that I could work if I kept in touch with the Doctors and made arrangements to get to the hospital as fast as possible.

I have done no running or jumping or anything and this accident I had is the only one I have had that I could account for receiving this hernia. I have had a number of physical examinations and have never had any hernia before this time. I lost no time whatever after

21st

this accident of January ~~26th~~, until two or three weeks afterward when I first noticed it and I have lost several days at different times since then. I did not make any report of this accident whatever until about three weeks afterward but I did tell Brown, the Conductor, about it the same night it happened and of course the whole crew knew about it. Above report includes all facts within my knowledge concerning this.

I Have Read the Above and It Is True:

I have read the above and it is true.

Martin R. DeVaney, San Bernardino, Calif., April 22, 1944.

Witness: Mrs. Martin R. DeVaney

C. T. Foster

D. J. Ford

Case No. 4876-PH. DeVaney vs. U. P. Deft. Exhibit B. Dated May 7, 1946. No. B Identification. Date May 7, 1946. No. B in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 12, 1946. Paul P. O'Brien, Clerk.

(Testimony of Martin R. DeVaney)

By Mr. Davis:

Q. Now I understood you to say that you went to Dr. Ballachey on the first trip after the fall from the flatcar.

A. Yes, sir, as far as I can recollect.

Q. Isn't it a matter of fact that you did not call on Dr. Ballachey until he examined you for the group insurance on February 16th?

A. No, sir. I saw Dr. Ballachey twice before that time. He already knew about the hernia when the accident papers came out.

Q. The accident papers?

A. I mean the insurance papers.

Q. But he examined you on February 16, 1944, for group insurance, didn't he?

A. I believe that was about the date.

Q. On that date he told you that you had a left inguinal hernia, did he not?

A. Yes.

The Court: That is the first time he told you that?

The Witness: He knew about that before. He explained it to me at that time, at the time of the insurance.

The Court: Had he told you that before?

The Witness: Oh, yes, your Honor. [73]

By Mr. Davis:

Q. What part of the train was this flatcar in that you fell from?

A. It was closer to the rear of the train than it was to the head of the train. It wasn't exactly in the middle. It was several cars from the caboose. It was about two-thirds back from the engine.

(Testimony of Martin R. DeVaney)

Q. About how many cars were there in the train?

A. Oh, somewhere in the neighborhood of between 20 and 30 cars.

Q. At the time that you fell, you say you stayed motionless for a while and until the train came to a stop?

A. Yes, sir.

Q. What part of the train came to a stop opposite you?

A. The caboose.

Q. Just the caboose came up to you when it stopped?

A. Yes.

Q. And Mr. Anderson got off the caboose then and helped you up?

A. Yes. The train was entering a siding at that time, and the caboose just went in the clear of the siding, and Mr. Anderson dropped off to get the switch and I was lying on the ground.

Q. As I understand it, it was your duty to make an examination or inspection of this train at all points at [74] which you had time to do so after leaving Yermo.

A. Yes, sir.

Q. That is the general duty of the swing freight man, isn't it?

A. Yes, sir.

Q. Did you make any inspection of the train at Yermo?

A. I don't recall all our stops that we made, but I made an inspection at every point that presented itself.

Q. You usually stop to take water at Barstow, don't you?

A. We usually stop to get our orders at Barstow.

(Testimony of Martin R. DeVaney)

Q. To get your orders?

A. Yes. We walk up on the right-hand side of the train there. I always walk up with the conductor.

Q. Did you walk up the right side at Barstow on this day? A. Yes.

Q. What time?

The Court: What was the answer, yes?

The Witness: Yes, sir.

The Court: After the accident?

The Witness: This was before the accident I am referring to.

By Mr. Davis:

Q. What time did you leave Yermo? [75]

A. We are usually called out of San Bernardino and Yermo about 2:00 o'clock. That is our regular schedule time.

Q. That would get you to Barstow when?

A. According to the train traffic, they were very busy at that time and it was just one train behind the other. It is hard to make an estimate.

Q. Do you remember on this occasion what time you got to Barstow?

A. If it was normal as to what work we had to do at Daggett, a station in between Barstow and Yermo, we would get into Barstow, if we left on time, around 4:30 or 5:00 o'clock. That was about our usual arrival time at Barstow.

Q. Of course that was broad daylight at that time?

A. The sun was just setting at that time.

(Testimony of Martin R. DeVaney)

Q. You made an inspection of the right side of the train there at Barstow?

A. Yes, sir. We walked up on the right side of the train at Barstow because the left side is all abbreviated with odd tracks and debris and the walking isn't very good. They were building a new yard at that time.

Q. Then at a later point, did you inspect the left side of the train?

A. Our next stop in a normal trip west would be at Victorville.

Q. Did you inspect the left side of the train there? [76]

A. I inspected the right side of the train. The main line runs right alongside the left side.

Q. Was it somebody else's duty to inspect the left side of the train?

A. Usually the conductor walks on the left side and—one of us or the other; we don't always walk the same side, but I always walk the right side.

Q. If you had seen any loose wires holding the tractor on, you would have fixed it up the way Mr. Hopkins did after the accident, wouldn't you?

A. If I had saw them; yes. If we had had time. The way our cargo was being shipped, if we stopped and repaired every car that had something hanging out or falling over during the war, we would never have got off the road.

Q. It didn't take Mr. Hopkins long to fix that wire.

A. No, not in this particular case.

(Testimony of Martin R. DeVaney)

Q. If you had seen that condition you would have fixed it up, wouldn't you?

A. I would have; yes.

Q. And if Br. Brown had seen that condition he would have fixed it up, wouldn't he? A. Yes, sir.

Q. You have told us that a good deal of the time you were off sick on account of this injury, during the remainder of 1944, and then even after your operation, is that correct? [77] A. That is right.

Q. Now speaking of this six days in September that you were held out for investigation, isn't it a fact that at that time you had a very severe cold and that that is why you were off?

A. No, sir. I was discharged from the Santa Fe.

Q. Didn't you go to the Santa Fe dispatcher at San Bernardino and tell him that you had a very bad cold and that you were going to have to stay off?

A. No, sir.

Mr. Karen: Your Honor, I believe my subpoena probably covered the report of that investigation. Have you those records, Mr. Davis?

Mr. Davis: Yes.

Mr. Karen: They will show whether or not the investigation was about a cold or a hernia or whatever it was. I haven't see them.

The Court: You will get your chance on rebuttal, but not until after 2:00 o'clock, to which time we are now adjourned.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m.) [78]

Los Angeles, California; May 7, 1946;
2:00 O'Clock P. M.

The Court: Ex parte matters?

The Clerk: No ex parte, your Honor.

The Court: DeVaney v. Union Pacific.

MARTIN R. DeVANEY,

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Mr. Davis: I wonder if I might have this marked for identification.

The Court: Yes.

The Clerk: Exhibit C.

(The document referred to was marked Defendant's Exhibit C for identification.)

Cross Examination

(continued)

By Mr. Davis:

Q. I show you Defendant's Exhibit C for identification and ask you if the written portion of that is in your handwriting. That is a photostatic copy of the original.

A. Yes, this is my handwriting.

Q. And you made this on November 1, 1944, did you

A. Yes, sir.

Q. I call your attention to question 10:

"On what date did you first have a physician?"

And your answer: [79]

"Early February."

That "early February" is in your handwriting, is it not?

A. Yes, that is right.

(Testimony of Martin R. DeVaney)

Mr. Davis: May this be introduced in evidence, your Honor?

Mr. Karen: I have no objection to that at all, your Honor.

The Court: Exhibit C in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit C.)

[DEFENDANT'S EXHIBIT C]

[Stamped]: Continental Casualty Co. Pacific Coast Rail Road Department 114 Sansome Street San Francisco, Calif.

40366

CONTINENTAL CASUALTY COMPANY

General Office: Chicago, Ill.

Claimant's Preliminary Notice of Accident or Sickness

Important—This blank should be filled out by the claimant and his doctor immediately after the commencement of disability and filed with the company at its General Office, 910 South Michigan Avenue, Chicago, or with:

Dated San Bernardino, Calif., Nov. 1, 1944
(Town or City) Date

1. Full Name Martin R. DeVaney Weight 185
Height 5' 10" Policy No. 9025064
2. Date of Policy 6-13-44 Date of last premium payment Nov 44 To whom paid Paid by the UP.
RR

(Defendant's Exhibit C)

3. Place and date of birth?
 Bridgeport Conn February 13 1906
 City State Month Day Year
4. What is your occupation? Brakeman Monthly earnings \$400—
 Describe fully your various duties Look over train on trips.
5. Employer's name Union Pacific Address Los Angeles.
6. When did you first notice symptoms of your illness or on what date did accident occur? January 21
 A.M.
 1944 P.M.
 Date ceased work Nov 1 1944 Hour 9 30 A.M.
P.M.
7. How did the accident happen? Fell from moving train while engaged on a trip.
8. Where were you at the time and what were you doing? Had been standing on flat car in train.
9. Name the sickness or nature of injury Internal injury to abdomen.
10. On what date did you first have a physician? Early February Where Yermo Calif and San Berd'o Calif.
11. Name of physician Dr. Balachey UP Physician Yermo, Calif. Address Dr. D. Gamette, Los Angeles
12. Have you been confined to a hospital. Yes Name and address Good Samariatian Hospital L. A.
13. Confined to hospital from Nov 9—1944 Hour 10
 A.M. A.M.
 P.M. to19.....Hour.....P.M.

(Defendant's Exhibit C)

14. If you have returned to work, state date No.....
19.....Hour.....A.M.....P.M.

15. If you have not returned to work, when will you be
able to? I dont know
Will a settlement to that date be satisfactory?.....

16. What other disability insurance (Life, Accident or
Health) do you have? Union Pacific Insurance Dept.

(State names of companies or association and
amount in each)

17. Names and addresses of witnesses to your accident
K. D. Anderson, R R Hopkins, Russell Brown All
Brakeman. Address Union Pacific San Bernardino,
Calif.

Sign your full name Martin R. DeVaney

San Bernardino Calif.

City or Town State

1219 W 10 St.

Street Address or P.O. Box Number

Residence Phone No.

* * * * *

Case No. 4876-PH. DeVaney vs. U. P. RR. Deft.
Exhibit C. Date May 7, 1946. No. C Identification.
Date May 7, 1946. No. C in Evidence. Clerk, U. S. Dis-
trict Court, Sou. Dist. of Calif. J. M. Horn, Deputy
Clerk.

[Endorsed]: No. 11426. United States Circuit Court
of Appeals for the Ninth Circuit. Filed Sep. 12, 1946.
Paul P. O'Brien, Clerk.

(Testimony of Martin R. DeVaney)

Mr. Davis: I just have one thing further, and that is with regard to Mr. DeVaney's earnings.

I have here a letter from Mr. Rish, initialed "C. C. S.," which is C. C. Shane, wage supervisor, showing the figures by months from the time Mr. DeVaney first entered the service through July 1945, before and after the operation.

I have asked counsel to stipulate that if called this man would testify that he had examined the records and that those figures would be shown. Counsel doesn't desire to do that. That apparently makes a considerable burden on us. Mr. Clark tells me that the payroll records are kept in books about two feet by three feet and about so thick (indicating), one for each month, and we can't very well bring those 12 up.

Would it be satisfactory if I bring the man who made this computation from those books and testify that he had [80] examined the books, rather than bring the books themselves?

The Court: You wouldn't be entitled to do that over the objection of the other side.

Mr. Karen: I will say this much: If I have a moment's opportunity to go over those figures with Mr. DeVaney and if they are substantially correct, I will withdraw my objection to them.

Mr. Davis: I will be glad to do that.

The Court: All right.

(Conference between the defendant and counsel.)

Mr. Karen: Your Honor, Mr. DeVaney says that in his book, that little book, he does have his figures as to

(Testimony of Martin R. DeVaney)

how much he made. We will check to see if they correspond.

The Court: Why not do that at recess, and he can be recalled.

Mr. Karen: Put it in for identification now if you want to, and then go into it later.

The Clerk: Exhibit D for identification.

(The document referred to was marked Defendant's Exhibit D for identification.)

By Mr. Davis:

Q. Did you give a history of this accident at the time you entered the hospital?

A. Only the questions I was asked. I don't recall all the history of it. [81]

Q. Some doctor asked you questions? A. Yes.

Q. As to the onset and progress of this condition, and all that, did he? A. Yes, sir.

Q. Did you tell the doctor: "About nine months ago"—and this was dated November 8, 1944—" (February 1944) the patient noticed swelling of the left testicle and a few days later swelling in the left lower abdomen."

Did you tell him that?

A. You say it was in February 1944 it shows there?

Q. I will show you how it is written here.

A. (Examining document) I gave them the brief of the case history of the thing, and whatever he wrote down, I don't know as to that. That is what it says here. He asked me the questions and I gave him as near as I could the dates and everything connected with it, or to my knowledge. That is nine months after this happened.

(Testimony of Martin R. DeVaney)

Mr. Davis: That is all.

The Court: Redirect?

Mr. Karen: Just a few questions.

Redirect Examination

By Mr. Karen:

Q. Mr. Davis has shown you statements purported or admitted to have been written and signed by you, particularly [82] the one dated March 4, 1944, and two other statements, one typed by Mr. Ford and signed by you, and I believe the other one was taken by Mr. Aaronson.

Is that correct, Mr. Davis?

Mr. Davis: Yes, I think so.

Mr. Karen: Was that signed?

Mr. Davis: Yes.

By Mr. Karen:

Q. And Mr. Davis asked you for an explanation as to the apparent discrepancy between what you testified to this morning and the statements that you made and wrote in those particular statements.

Now will you explain to the Court why that discrepancy exists, if any?

A. You are referring to the time of the injury?

Q. Let's take the statement of March 4th, in which in answer to a question, question 21, "What does injured person say as to extent of his injuries?" and you wrote this: "No injuries noticed until about three weeks after accident."

And then there is also the answer given to Mr. Ford which is substantially the same.

(Testimony of Martin R. DeVaney)

Will you explain to the Court why you made that statement in that manner, or those statements?

A. Well, I was hurt. If I told them how bad I was hurt they would pull me out of the service. I had to feed my [83] family. I didn't know what was going to happen on this at all.

Q. On this stand on direct examination you stated that you felt immediate pain and that there was a swelling and you noticed that when you took a shower.

A. Yes.

Q. Are you telling the truth? A. Yes, sir.

Q. And when you made these statements some weeks later, did you mean by that that you are retracting your statement that you made this morning?

A. No, I am not retracting my statement. I have tried to explain myself as well as I could so far.

Q. At the time that you made a statement to Mr. Ford, which is this Defendant's Exhibit B, who did the typing? A. Mr. Ford.

Q. Did he ask you questions as he typed this report?

A. He sat at the typewriter and he asked questions and he would say, "Did this happen this way" or "Did that happen that way," and I would say, "Yes," and he would write it down the nearest he could to it.

Q. At the time Mr. Ford took this statement to you, did he say anything to you pertaining to this accident other than what is contained in this report?

A. He didn't say anything further outside of what they [84] were going to do about it.

(Testimony of Martin R. DeVaney)

Q. Did he talk to you about the operation?

A. He said they were going to fix me up just like new. I would be taken down to the hospital and be compensated for the damage after they found out from the operation.

Q. What was your frame of mind then at that time concerning the accident, the injury, the operation, and everything connected with it?

A. I just didn't take the report or anything for granted because the way he talked to me everything would be taken care of and I would be operated on and put in good shape and didn't have to worry about my family or anything like that. I just rested at ease that the company would take care of it.

Q. What did he say he wanted the report for?

A. He wanted to make a picture of the thing to send to Omaha for his records so he knew where to send it for adjustment.

Q. Did you read it before you signed it?

A. I looked at it and signed it. I didn't read it. I had just finished working 16 hours. I was hungry and tired. I wanted to go home.

Q. When you made that statement referred to a few moments ago, when you entered the hospital, as to when the injury occurred, and I think the answer was about nine months ago, and that statement was made in November of '44— [85]

A. Yes, sir.

Q. Or I think the answer would be more correct to say the early part of February.

A. Yes, sir.

The Court: That is in the hospital records?

Mr. Karen: Yes.

(Testimony of Martin R. DeVaney)

Q. What were you referring to there? That is the first time you saw a physician was the first part of February 1944, is that true?

A. I don't quite understand.

The Court: I don't understand that either.

By Mr. Karen:

Q. In the hospital report Mr. Davis referred to a question—

Mr. Davis: I think you are confused with the report to the insurance company.

The Court: He read from the hospital report a few moments ago.

Mr. Davis: Yes, but not as to when he first saw a physician.

The Court: That is the reason I say he had better start over again.

The Witness: Yes.

Mr. Karen: Let me have the insurance report.

(The document referred to was passed to counsel.) [86]

By Mr. Karen:

Q. In this insurance report you make a statement: "On what date did you first have a physician?"

The answer: "Early February.

"Where? Yermo, California and San Bernardino, California."

Is that absolutely correct when you say early February?

A. Well, no. It was in January the first time I saw the doctor.

(Testimony of Martin R. DeVaney)

Q. Why did you make a statement there early February?

A. I had to go back to the doctor again after the first time. You see, I had a swollen abdomen and I had it wrapped up with Sloan's Liniment, and I saw Dr. Ballachey and he said he had an idea of what was wrong with me, and I went to Dr. Ballachey the second time and he told me I had a hernia and explained to me how they come about.

The Court: The second time you went he told you that?

The Witness: Yes, your Honor. The first time he examined me he said he believed that is what I had, but when I went back to him the second time he was positive.

By Mr. Karen:

Q. The first time you saw Dr. Ballachey was January 22nd, is that correct?

A. On my trip to Yermo; yes, sir.

Q. And you stated on direct examination that it was [87] late at night when you saw him?

A. I had to get the doctor out of bed.

Q. How was he dressed?

A. He had his robe on and he was smoking a cigarette in a long cigarette holder, and he had bedroom slippers on. He came out and had me sit in the chair and he examined me.

Q. Do you know whether or not he made a report of that in his records? A. I don't know.

Q. Did he do any writing in your presence?

A. Not that I could see.

(Testimony of Martin R. DeVaney)

Q. I will ask you one more question, Mr. DeVaney: From the date of the accident, January 21, 1944, until March 4, 1944, were you involved in any other accident?

A. No, sir.

Q. Did you suffer any injury of any kind from any cause during that period of time?

A. Not that I can recall. I was in a train wreck but I never had any other physical injury that I recall.

Q. You weren't hurt in any way at all?

A. Not that I recall.

Q. Did you suffer any blows to your abdomen during that period of time?

A. No, sir.

Q. Did you strain yourself in any way during that period of time?

A. No, sir.

Mr. Karen: No further questions.

Recross Examination

By Mr. Davis:

Q. You had been subject to colds a good deal, hadn't you, before this time that you fell from the flatcar?

A. I wouldn't say any more than usual.

Q. Weren't you out of service for several days due to a cold in November of 1943?

A. November of '43—I was just trying to recall —(pause).

Mr. Karen: Your Honor, I don't see the materiality of that particular question.

Mr. Davis: What I have in mind is this: The doctors will testify that coughing is perhaps the greatest cause of hernia, and maybe heavy lifting and that sort of thing too, but coughing is one of the principal causes.

(Testimony of Martin R. DeVaney)

Mr. Karen: In that particular regard, your Honor, I believe the doctors will testify that as I am talking right here I can develop a hernia. Anything can cause it. If you want to go into medical background, how many times he sneezed or coughed prior to this accident, I am perfectly willing to let you do so, but it might take a long time.

The Court: The objection is overruled. Proceed. [89]

The question is whether or not you had a cold in November of 1943.

The Witness: That I couldn't recall.

By Mr. Davis:

Q. I will try to refresh your memory. You remember that you were taken out of service during the fall of 1943 because you told the dispatcher at San Bernardino, the Santa Fe crew dispatcher, that you had a cold and didn't feel like going on to work, and he nevertheless didn't mark you off, you didn't report, and you were removed from service. Do you remember that?

A. I remember that. Dr. Nevin gave us all cold shots to guard against colds, and it multiplied the cold into you so that the whole crew were sick from it.

Q. Weren't you off for colds several months later?

A. Just from the results of the shot.

Q. What?

A. Just from the results of the cold shots. We worked between 80 degrees in San Bernardino up to probably

(Testimony of Martin R. DeVaney)

freezing temperature on top of the mountain there at Summit. There is a change of temperature there within two or three hours and you are subject to colds getting on and off the train, but no more than usual. We were trying to guard against these colds so that we could keep on working.

Q. Periodically you did have during that period of [90] time numerous colds, didn't you?

A. Just ordinary colds; yes, sir.

The Court: Do you have these colds now?

The Witness: It was just merely reflecting the shots. Maybe a head cold.

The Court: Is that the type of colds that you are usually subject to, some bronchial or a head cold?

The Witness: A head cold.

The Court: Is that the type you usually had, a head cold?

The Witness: Yes.

By Mr. Davis:

Q. Did you cough with those colds?

A. Just normal coughing possibly.

Q. As a matter of fact, I think you have been to Dr. Ballachey since the operation for a cough, haven't you? I think it was in April, May or June of 1945, or maybe it was 1944, I don't remember.

A. Well, if you feel a cold coming on you go to the doctor about it and he usually gives you some pills or

(Testimony of Martin R. DeVaney)

something and takes care of it. If you wait until they get too severe you are going to lose time over it and you can't work.

Mr. Davis: That is all.

Mr. Karen: No further questions.

The Court: Mr. DeVaney, in connection with your testi- [91] mony here that you noticed a swelling immediately after the injury, or that morning, and in the reports you state in two reports that it was several weeks later that you noticed the swelling, before you took the witness stand here did you get hold of Dr. Ballachey and verify with him the dates that you had first gone to him, or are you depending upon your recollection now?

The Witness: I am just depending on my recollection and my time-book.

The Court: And your time-book?

The Witness: That is all I can remember of it.

The Court: I see. All right.

Mr. Karen: I might have one more thing to point out in the time-book, your Honor.

The Court: When you get to the argument.

Mr. Karen: All right.

No further questions.

The Court: That is all. Step down.

(Witness excused.)

The Court: Next witness.

Mr. Karen: Dr. Ballachey.

DR. J. E. BALLACHEY

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [92]

The Clerk: Your name, sir?

The Witness: Dr. J. E. Ballachey; B-a-l-l-a-c-h-e-y.

The Court: Yermo, California?

The Witness: Yes, sir.

The Court: What street address?

The Witness: Box 381, your Honor.

Direct Examination

By Mr. Karen:

Q. Dr. Ballachey, you are a physician and surgeon, a medical doctor? A. Yes, sir.

Q. By whom are you employed?

A. The Union Pacific Railroad Company.

Q. Where is your office located?

A. Yermo, California.

Q. What is your particular work up at Yermo?

A. To take care of the personnel of the Union Pacific Railroad; also private practice.

Q. Were you at that particular station on or about January 22, 1944? A. Yes, sir.

Q. Dr. Ballachey, do you keep a record of all employees who come to you for treatment?

A. They are supposed to bring an order for treatment.

Q. On or about January 22, 1944, was that the procedure at that time? A. Yes, sir.

[93]

(Testimony of Dr. J. E. Ballachey)

Q. What were they supposed to bring—who were they supposed to bring an order from?

A. It depends on what department they work for. They are to get it from the crew dispatcher in the traffic department.

Q. Dr. Ballachey, do you have any record of Mr. DeVaney seeing you late in the evening of January 22, 1944?

A. I have not; no.

Q. Do you know whether or not you talked to him that evening and examined him that evening?

A. I have no recollection of it.

Q. In other words, you don't remember whether you did or didn't?

A. I don't remember seeing him at that time.

The Court: Would you say that you did not?

The Witness: Not absolutely, your Honor; no.

The Court: You are used to interruptions at night?

The Witness: Very frequently.

The Court: In your practice?

The Witness: Yes, your Honor.

By Mr. Karen:

Q. You heard Mr. DeVaney say that he woke you up and that you came down dressed in a dressing gown and with a [94] cigarette holder. Does that refresh your memory?

A. I don't remember; no, sir.

Q. What is the first thing you do remember about Mr. DeVaney with regard to an injury to his abdomen?

A. I have no memory of Mr. DeVaney coming to me for any injury of his abdomen. If he did, an accident report would have been made at that time, and the chief surgeon would have that in his records.

(Testimony of Dr. J. E. Ballachey)

Q. You wouldn't have that in yours, is that right?

A. No. All those records go in to the chief surgeon.

Q. Do you recall talking to him about an insurance policy, group insurance policy?

A. No. Only the records show that he was examined for group insurance.

Q. By whom? A. I examined him.

Q. Do you recall the date?

A. The record shows on the 16th of February.

Q. You examined him at that time?

A. Yes, sir.

Q. Did you observe whether or not there had been an injury in the vicinity of his abdomen, left abdomen?

A. He had a small hernia at that examination, which was recorded.

The Court: By the way, did you take from him a history [95] of that hernia at that time?

The Witness: Just in the examination, just the statement that the hernia is present, a left inguinal hernia.

The Court: A left inguinal hernia?

The Witness: Yes, a small one.

The Court: But you do not remember asking him when he got it or how it happened?

The Witness: No, sir. I have examined hundreds, thousands, of them.

By Mr. Karen:

Q. Dr. Ballachey, you are familiar with this type of hernia? A. Yes.

Q. Now isn't it true that if an individual receives a blow or impact in this particular vicinity of the region of the body, such as Mr. DeVaney has testified to that he

(Testimony of Dr. J. E. Ballachey)

received when he fell from the train, isn't it true that that could be the cause of a hernia?

A. It is possible.

Q. And isn't it true that a normal hernia, what is called the normal type of hernia, in most cases does not cause a swelling to a great extent until a considerable period of time after the actual impact?

A. If an individual is ruptured or receives a hernia there is immediate pain at the time of the accident, or the [96] cause.

Q. Now at that point, if the blow or impact is sufficiently hard, will there be a swelling there not as a result of the protrusion of the intestines through the abdominal wall, but as a result of the impact itself?

A. It would take some time for a swelling to occur after a blow.

Q. Would it be a matter of hours? A. Yes.

Q. If this particular impact, as has been established here, occurred at 10:20 in the evening of January 21st, would that swelling be possible the next morning?

A. There might be some swelling the next morning; yes, sir.

Q. And we are referring now to a swelling caused by the impact. A. Not the hernia you mean?

Q. That is right. A. Yes.

Q. Now the actual swelling that would be caused by a hernia, that is, the protrusion of the intestines through the abdominal wall, could occur several weeks later, isn't that true, in a normal case?

A. If he received a hernia or rupture at the time of this accident he would notice pain and swelling immediately [97] at the site of the rupture.

(Testimony of Dr. J. E. Ballachey)

The Court: But the question is, would the intestines protrude through the rupture then or later or any time?

The Witness: Well, your Honor, a rupture is either large or small.

The Court: I suppose I ought to tell counsel here that I suffered from a right inguinal rupture all my lifetime until I was 25 years old, so maybe I know something about hernias.

Mr. Karen: What I was questioning him along the line was the time between the two different swellings. That is the point I was trying to bring out.

Q. To go along with your question, your Honor, there is the type of hernia that protrudes immediately if it is a violent enough situation. That is possible, isn't it?

A. Absolutely.

Q. And that is what you would call a case where a man needs immediate attention right then and there?

A. Naturally.

The Court: That then becomes a strangulated hernia?

The Witness: Yes.

By Mr. Karen:

Q. However, there is the type of hernia that will begin to swell some time after the actual impact, isn't that true? That is possible? [98]

A. Not without having symptoms, pain and discomfort.

Q. Yes. Assuming the symptoms of pain immediately upon impact—

A. Yes, sir.

Q. —then it is possible several weeks later that there can be a swelling from the protrusion?

A. It gradually gets larger and larger.

(Testimony of Dr. J. E. Ballachey)

The Court: The long and short of it is that any hernia might become strangulated at any time in which event if it becomes strangulated enough there is pain?

The Witness: Absolutely, your Honor.

Mr. Karen: I have no further questions to ask Dr. Ballachey.

Cross Examination

By Mr. Davis:

Q. Dr. Ballachey, did you bring with you your records, treatment records, during the months of January and succeeding months?

A. No. There is no record of him seeing me in January. But in May and June he was in to see me.

Q. Do you have with you the records that you keep in your office showing who came to you during January?

A. No, I haven't got that with me; not for January, no.

Q. Did you examine that record recently? [99]

A. I did; yes.

Q. Is there any record of your having seen Mr. DeVaney in the month of January 1944?

A. There is not.

Q. Is there any great probability of his having been to see you without your having made a record of it?

A. It is possible. Very often they do not bring slips for treatment and then of course there is no record made unless there is an accident report.

(Testimony of Dr. J. E. Ballachey)

The Court: And you are not obliged to give treatment?

The Witness: No.

By Mr. Davis:

Q. Now, if Mr. DeVaney had ever come to you and said that he had been injured in an accident, what was it your duty to do?

A. Why, I would have made a report of it, an accident report, and sent it in to the chief surgeon.

Q. Have you looked for such a report in the records of the chief surgeon?

A. I was informed they didn't have any.

Q. Do you have any record in your notes there of seeing Mr. DeVaney later on in 1944?

A. I saw him in May and in June.

Q. What did he complain of in May?

A. In May he complained of indigestion; in June he was [100] in for a cough.

Mr. Davis: I think that is all.

The Court: Dr. Ballachey, if a man should fall from a moving train traveling between 8 and 15 miles an hour and land on his abdomen upon some boards or debris, is it possible that he could then have suffered from that fall a left inguinal hernia which might not swell or give him any discomfort for several weeks?

(Testimony of Dr. J. E. Ballachey)

The Witness: I don't think it is possible, your Honor. I think he would have had within a few days or hours even some pain.

The Court: Some discomfort?

The Witness: Some discomfort and pain.

The Court: Would it be possible for him to have suffered a slight separation of the abdominal wall so that upon further strain, such as the act of sexual intercourse several weeks later, it might produce a small strangulation?

The Witness: I think if he had any separation of the abdominal wall or disturbance of the peritoneum he would have had pain immediately. The peritoneum, which is a covering of the bowel, is exceedingly sensitive and causes pain at once, such as when you have appendicitis or gallstones or anything like that.

Mr. Karen: No further questions, Doctor. [101]

Mr. Davis: That is all, Doctor.

May the doctor be excused?

Mr. Karen: He may be excused.

(Witness excused.)

Mr. Karen: I think we might as well get rid of Dr. Nevin now at the same time.

DR. J. L. NEVIN

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Dr. J. L. Nevin; N-e-v-i-n.

The Clerk: Your address?

The Witness: Professional Building; San Bernardino, California.

The Clerk: Take the stand.

Direct Examination

By Mr. Karen:

Q. Mr. Nevin, by whom are you employed?

A. Well, I am in private practice as a surgeon and also do the catch-as-catch-can for the Union Pacific at San Bernardino.

Q. In other words, if a man working for the Union Pacific and he happens to be in San Bernardino and comes to you, you are the man? [102]

A. You're right.

Q. Do you have any record, Dr. Nevin, of having seen Mr. DeVaney on January 22, 1944?

A. No, I haven't.

Q. I have a 1944 calendar. January 22nd falls on a Saturday. Would you be in the office on that day?

A. I would be until noon; maybe about 1:30 or 2:00, the way things have been going, before I get out of there.

(Testimony of Dr. J. L. Nevin)

Q. Therefore if Mr. DeVaney wanted to see you in the morning or around noon of January 22nd at your office, you would have been able to see him?

A. Yes, he would have.

The Court: He would have?

The Witness: Yes.

Mr. Karen: I beg your pardon?

The Witness: He would have been able to see me.

By Mr. Karen:

Q. On the morning of January 22nd?

A. The morning, Saturday, yes.

The Court: I think we all misunderstood your answer. The question was whether or not you were in the office in the morning and I think he understood you to say that you didn't come in until noon.

The Witness: No, I come to the office and stay in the office until noon, until I get all the morning work cleared [103] up. Just as quick as I get everything cleared up, whether it is noon—it usually runs until about 1:00 of 1:30 the way things have been going since the war—then I leave the office at that time on Saturday afternoons. The same way on Wednesday afternoons.

By Mr. Karen:

Q. If Mr. DeVaney wanted to see you after 12:00 o'clock, say between 12:00 and 2:00, it is possible that you were out, is that right?

A. It is possible, yes, that I may have been out between those hours.

The Court: Do you remember whether or not you were in your office on January 22nd?

The Witness: I couldn't remember that far back.

(Testimony of Dr. J. L. Nevin)

By Mr. Karen:

Q. Do you recall at all, Doctor, when you saw Mr. DeVaney with regard to this particular injury?

A. May I ask you a question? When was Mr. DeVaney operated on? I can get my recollection a lot better from that.

Q. I think he has testified he was operated on on November 8, 1944.

A. Well, I wasn't here when he made that statement. I saw DeVaney I think along in the early spring. At that time he came in complaining of pain.

Q. Was that in the month of January? [104]

A. No, that must have been along in March, somewhere along in there, or the latter part of February, or March.

Q. Do you have any record of when he came in?

A. I haven't any records of when he came in. When he came in I examined him and found he had a left inguinal hernia and I made out a slip and referred him to Dr. Gamette. That is all I know about the case.

Q. Dr. Nevin, didn't Mr. DeVaney come to your office many, many times?

A. He was there, but not for that. He went down to see Dr. Gamette and he came back to see me and said that Dr. Gamette was not going to operate, I said, "He is busy. You have to wait until he has time. I don't know when that time is."

Finally when Dr. Gamette made his appointment to operate on him he called him into his Los Angeles office here and operated on him. That is the only thing I know about the whole story. As far as dates are concerned,

(Testimony of Dr. J. L. Nevin)

that is too far back for me to remember. I do not remember.

Q. Maybe I can use you then as an expert witness and see what you know about hernias, since we have had Dr. Ballachey testify to that.

Is it possible, Dr. Nevin, if a man falls from a flat-car, from a train, on his abdomen upon a bunch of debris, or let us say even on flat ground, that at that particular time [105] there would be a breaking of the tissues which would result in a rupture, hernia, or whatever the medical term is?

A. That is not my idea of a hernia. I still maintain to the theory that a man is born with a hernia. Each man has a potential hernia. How well his tissues have been built up depends on the strain that comes on. That is my idea of a hernia.

The Court: Could the situation that he describes produce such a strain as to cause a hernia?

The Witness: It could immediately yes. But over a period of three or four weeks, I doubt that under my own observation after 30 years as a surgeon.

By Mr. Karen:

Q. In other words, if he did observe within, say, a matter of few hours later that there was a swelling, a red mark, on his lower abdomen, left side, that could have been caused by that fall, is that correct?

A. That is a possibility. I don't know what the fall is that he had or anything, but as far as the fall is concerned anything can do it.

Q. If that portion of his body came into contact with something sufficiently hard, is it possible that a swelling

(Testimony of Dr. J. L. Nevin)

would result, not from the protrusion of the intestines but merely from the blow itself?

A. Well, there is a question about that too, when you [106] come right down to it.

Q. Is it possible?

A. Well, anything is possible.

Q. Then to go on, if there had been at that point at that particular impact a breaking, an actual swelling caused by the protrusion could result, say, several weeks later?

A. He would have noticed it before then, before several weeks.

The Court: Noticed the swelling?

The Witness: Noticed the swelling.

The Court: The swelling through the inguinal ring?

The Witness: Yes, he would have noticed the swelling. Not three weeks after, he would have noticed it before.

The Court: You mean the intestines would always protrude through the inguinal wall?

The Witness: You see a lot of them going through with intestines protruding and no pain whatever.

The Court: Lots of times they have a rupture and it doesn't protrude?

The Witness: That is right.

The Court: The classic test is to insert a finger and have someone cough.

The Witness: For a potential hernia?

The Court: A potential hernia.

The Witness: Yes, you are right. [107]

(Testimony of Dr. J. L. Nevin)

By Mr. Karen:

Q. The particular thing we are interested in is whether or not there is any causation between this fall and what we know happened to be a hernia later on because he was operated on. Does that causation in your mind piece itself together?

A. No. I see so many different slight things and then a fellow will develop a hernia somewhere, from a fall or whatnot. You can cause it in any way, shape or form. You may take a step and do it.

Q. But if a man came in to you and said he had just fallen off a train, fallen on his stomach, and say he came to you three weeks later after it happened and there was a swelling there, which you had diagnosed as a hernia, isn't it possible that you could put two and two together?

A. No. Just like I explained to you, all hernias are congenital. We are born with them. You might have some little thing come along and cause a breakdown of the internal or external ring on the inguinal canal. It is just like I explained to you about how the ring is formed.

Mr. Karen: I have no further questions.

Cross-Examination

By Mr. Davis:

Q. Doctor, do you recall whether Mr. DeVaney, when he came to see you and you discovered this hernia, told you of [108] having had an accident?

A. No, I have no history of any accident.

(Testimony of Dr. J. L. Nevin)

Q. Suppose a history of an accident had been given to you in connection with it, what would it have been up to you to do?

A. In my office the girl sees to it that all the records are made and the forms are made out and sent down to Dr. Gamette, where they request to have them sent.

The Court: That is what you did here? You sent this to Dr. Gamette?

The Witness: No, I sent him a slip for the operation, referring him to Dr. Gamette, but not the record of any injury. We have different forms.

The Court: Why is Dr. Gamette involved in it if there is no connection between the hernia and the railroad? I mean, why did you send him to Dr. Gamette?

The Witness: Because he works for the railroad and the railroad, whoever the insurance carriers are, send him down for Gamette to repair that. I guess they do that as a matter of principle to keep their men in shape.

Mr. Davis: I might explain, we have a hospital department and the men are entitled to treatment. They contribute a certain percentage. They are entitled to treatment for any condition, whether it is injury, sickness, or whatnot.

The Court: All right. [109]
By Mr. Davis:

Q. I understand that there is a particular form which you are required to fill out any time that a man claims that his condition was due to injury on duty, is that so?

A. Yes, you are right.

Q. Did you ever make any such form out for Mr. DeVaney?

A. There never was one made out for Mr. DeVaney.

(Testimony of Dr. J. L. Nevin)

Mr. Davis: I think that is all.

The Court: A man can have a hernia and have it for many years without any pain, is that so?

The Witness: You are right.

The Court: Or without any swelling?

The Witness: You are right.

The Court: And it might come on, I mean it might become strangulated—I think that is what you call it when the intestines protrude?

The Witness: No, it is when you can't get it back. But it may come down through and recede and appear and go back.

The Court: All without pain?

The Witness: Yes.

The Court: But there might be discomfort?

The Witness: Yes. Each year you go on you are straining it and you are making the hole larger and finally it gets so big you have trouble. That is the way it happens.

Mr. Karen: Mr. DeVaney reminded me of something to ask [110] Dr. Nevin.

Redirect Examination

By Mr. Karen:

Q. Do you recall, Dr. Nevin, that sometime in September 1944 an investigation was held as to why Mr. DeVaney was off from work so much?

A. They called me up and asked me. They were having a little trouble with the men, but I didn't get into it at all. I said I didn't know why.

Q. Who called you?

A. The chief dispatcher.

(Testimony of Dr. J. L. Nevin)

Q. Did he ask you about Mr. DeVaney?

A. I couldn't tell you that. Those things are a long time ago.

Q. There was one investigation about Mr. DeVaney, wasn't there?

A. Not with me there wasn't. I wasn't called in on any investigation.

Q. Did someone call you on the phone and ask you as to whether or not he had come to your office for treatment?

A. These fellows, I usually give them a slip to go back to work and everything else, when they come up there.

Q. Isn't it true, Dr. Nevin, that at the time Mr. DeVaney came to you and you gave him this slip to go down to Dr. Gamette, you said to your girl, "Don't make a report of [111] this, I am giving him a slip to Dr. Gamette"?

A. No. I never do that because there is no report to be made.

Q. No report to be made?

A. No, only the slip down there, as he explained to the judge, about the Union Pacific taking care of their men.

The Court: There is no report to be made unless it is an accident connected with the railroad, is that right?

The Witness: That is right. Dr. Ballachey is probably the one who saw him first. I saw him later on, maybe for treatment. Maybe he was sent down there for treatment or something.

(Testimony of Dr. J. L. Nevin)

Mr. Karen: That is all.

Mr. Davis: That is all. Thank you, Doctor.

The Court: This doctor may be excused?

Mr. Karen: Yes.

(Witness excused.)

The Court: Next witness.

Mr. Karen: Mrs. DeVaney.

MRS. HILDA DeVANEY,

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Mrs. Hilda DeVaney. [112]

The Clerk: Your address is the same as your husband's?

The Witness: Yes.

The Clerk: Take the stand.

Direct Examination

By Mr. Karen:

Q. Mrs. DeVaney, you are the wife of the plaintiff in this case? A. Yes, sir.

Q. I will draw your attention to the date of January 22, 1944. Did you see your husband on that date?

A. It was early in the morning when he came home from work.

Q. What time was that?

A. Between 2:00 and 3:00 in the morning.

Q. Did you have a conversation with him at that time?

A. I asked him if he wanted something to eat, and he

(Testimony of Mrs. Hilda DeVaney)

said he didn't feel like eating, he felt kind of sick to his stomach.

He said he was going to take a shower. I said, "How about having some coffee?"

He said, "Okay. I will drink some coffee."

So he drank the coffee and went in to take a shower.

Q. Just a minute. Did he tell you why he didn't feel like eating?

A. He told me after he had sat down and rested a few [113] minutes. He said, "I had a little trouble getting home."

I said, "What happened?"

"Well," he said, "I fell off of a flatcar up there at Cajon Pass."

I said, "Did you get hurt?"

"Well," he said, "my stomach hurts me."

Q. And he didn't want anything to eat, is that right?

A. He didn't want anything to eat; no.

Q. Did you state a few minutes ago that you gave him some coffee?

A. Yes, I gave him some coffee.

Q. Then what happened?

A. Then he went in to take a shower.

Q. And then what?

A. Well, after he come out of there he said, "I am going to lie down for a while."

When he went in to lay down I said, "Your stomach is all red. What happened there?"

Then I noticed his tooth, his lip was kind of cut, and his knee.

Q. Did he say anything about his stomach?

A. Well, he said it was paining him down on his left side.

(Testimony of Mrs. Hilda DeVaney)

Q. What did you see?

A. Well, it was swollen and red. [114]

Q. Did you do anything?

A. Well, I got some alcohol and I gave him an aspirin tablet, and got some alcohol and rubbed him down with it.

Q. He went to bed then? A. Yes.

Q. Do you know what time he got up?

A. About 9:30, 10:00 o'clock; between 9:00 and 10:00.

Q. Did you have a conversation with him at that time?

A. I asked him—

Mr. Davis: Just a minute. I object to any further conversation. I do not think that is material.

The Court: Sustained.

By Mr. Karen:

Q. You saw your husband when he got up?

A. Yes, sir.

Q. Do you know what he did then? Did you observe him doing anything?

A. He told me he was going to try—

Mr. Davis: Just a minute.

Mr. Karen: Don't say what he told you. I mean, don't talk about conversations, just say if you know what he did.

Q. What did he do?

A. Well, I can't say anything unless I say what he said. What I mean is, he was going to the doctor. He wanted to see the doctor, is what he wanted to do. [115]

Q. Do you know whether he went to the doctor or not?

A. He was going to the doctor.

Q. Did he leave the house?

A. He called the doctor, is what he did.

Q. He called the doctor? A. Yes, Dr. Nevin.

(Testimony of Mrs. Hilda DeVaney)

Q. Do you know whether or not he saw Dr. Nevin that day?

A. I don't know whether he saw him or not; not until he got back from the telephone call.

Q. When he came back from the telephone call what happened?

A. Then he said, "Dr. Nevin would only—"

Q. Wait a minute.

Mr. Davis: Go ahead.

By Mr. Karen:

Q. Mr. Davis is perfectly right, and you can't relate conversations, but when he came back do you know whether or not he had seen the doctor?

A. No, I know he didn't see the doctor.

Q. All right. Do you know why he didn't see the doctor?

A. Because the doctor was only going to be in until around 12:00 or 12:30.

Q. What time was this? [116]

A. This was about 10:00 o'clock, a little after 10:00.

Q. Do you know whether or not your husband went to work that day?

A. Yes, he did.

Q. What time?

A. They called him at 2:00 o'clock and he was supposed to leave the yard at 2:30.

Q. At that particular time did he say anything to you about pain in his abdomen?

A. He said he didn't feel like going to work, and that was one reason why he wanted to get hold of Nevin, so he could get marked off and in order to keep from going to work.

(Testimony of Mrs. Hilda DeVaney)

Q. But he left for work? A. Yes.

Q. When did he return? A. The next day.

Q. Do you know whether or not he had seen a doctor while he was gone?

A. When he came home he told me he went to see Dr. Ballachey.

Q. Now during this period of time you have heard your husband testify that he was off many days?

A. Yes.

Q. Do you know yourself how many days he was off from work? [117]

A. Not exactly, but it was quite a while. I know he lost quite a lot of time.

Q. Do you know whether or not during this period of time up to the time of the operation he was suffering from pain? A. He always complained all the time.

Q. Do you know whether or not during this period of time he tried to work as much as he could?

A. He tried to keep going as long as he could, and there were lots of times when he shouldn't have went to work but he did.

Q. Now do you recall the day when Mr. DeVaney was to come to the hospital? A. Yes.

Q. Were you with him on that day?

A. Yes, sir.

Q. Were you with him when he attempted to secure transportation to the hospital? A. Yes, sir.

Q. What happened?

A. He went down to the Santa Fe crew dispatcher and he was supposed to have gotten transportation from the U. P. to come up to Los Angeles to go to this Good

(Testimony of Mrs. Hilda DeVaney)

Samaritan Hospital. So when we got down there, for some cause or other, the pass didn't show up. [118]

So we went up to Mr. Grimm's office and Mr. Grimm said, "I will try to get you a pass on one of the Santa Fe trains."

Q. How did you finally come to Los Angeles?

A. All the Santa Fe trains had gone anyhow, so Mr. Grimm gave us a pass to go down on the Pacific Electric bus. That is how we got here.

Mr. Karen: I have no further questions.

Mr. Davis: No questions.

The Court: Mrs. DeVaney, here is Defendant's Exhibit B, which has the signature of Mrs. Martin R. DeVaney. Do you recognize that?

The Witness: Yes, that is my handwriting.

The Court: Do you remember signing it?

The Witness: Yes.

The Court: Where were you when you signed it?

The Witness: That was in Mr. Ford's office in San Bernardino, in the agent's office.

The Court: Did you read this statement through?

The Witness: No, I didn't read it.

The Court: You don't know what is in it at all?

The Witness: He asked the questions and we answered it as best we could.

The Court: You were present when he asked the questions?

The Witness: Yes.

The Court: Did your husband at that time say to Mr. [119] Ford something to the general effect that when he fell off the train he didn't notice any pain in the region of his groin to indicate he had received a hernia at the

(Testimony of Mrs. Hilda DeVaney)

time? "I had lost my breath and was a little shaky at the moment, thinking I was lucky I didn't go under, and I did not notice any pain in this area afterwards until about two or three weeks later I noticed, after cohabitation with my wife, I noticed quite a severe pain and my left testicle swelled up to about the size of an orange."

The Witness: That is right.

The Court: That is what he stated that day?

The Witness: That is right.

The Court: And that is a fact, he had no swelling in his testicle until two or three weeks after he fell?

The Witness: No, what I am trying to say is he did have swelling. He had swelling the morning he came home.

The Court: In his testicle, in his scrotum sac?

The Witness: Yes. And his stomach was all red and inflamed and swollen.

The Court: And he made this statement, that he didn't notice it until two or three weeks after?

The Witness: It was swollen.

The Court: Did he make the statement to Mr. Ford that he did not notice any pain until two or three weeks after he fell off the train? [120]

The Witness: Mr. Ford asked the questions and—

The Court: Did he say yes to that question? Did he make the statement?

The Witness: I won't say whether he did or not because I don't remember that.

The Court: You don't remember that?

The Witness: No.

The Court: You do know for a fact, or are you testifying now to that, that the scrotum sac was swollen, or his

(Testimony of Mrs. Hilda DeVaney)

testicle, immediately after the accident, that is, on January 22nd, in the morning as he testified?

The Witness: When he came home that morning.

The Court: Did he complain of pain in the region of his testicle or only in the groin?

The Witness: I know his stomach was red and swollen.

The Court: He states here also that he noticed it "after cohabitation with my wife." Do you remember whether or not he had cohabitation with you that night when he came home?

The Witness: I don't remember that, but I know whenever he did he would always complain.

The Court: After this accident?

The Witness: Yes.

The Court: Do you recall that night whether or not you noticed a swelling shortly after he got home? [121]

The Witness: It was in the morning; it wasn't at night.

The Court: It was early in the morning?

The Witness: Yes, when he came home.

The Court: That is what I mean, early in the morning when he came home. When did he take his shower, before he went to bed?

The Witness: Yes.

The Court: Right after he had the coffee?

The Witness: Right after he had the coffee.

The Court: That is when you noticed the swelling?

The Witness: When he got in bed, then I noticed the swelling.

The Court: You noticed the swelling?

The Witness: And I got the alcohol and rubbed him with it.

(Testimony of Mrs. Hilda DeVaney)

The Court: Had he vomited by that time?

The Witness: Yes, he had.

The Court: He had previously?

The Witness: He had been in bed, then he said, "I am going to get sick to my stomach," and went up to the bathroom and vomited.

The Court: That is when you noticed the swelling?

The Witness: He was swollen already.

The Court: Is that when you first noticed it?

The Witness: When he was in bed. [122]

The Court: Did you notice the swelling before he went to the bathroom to vomit or after he came back?

The Witness: It was swollen all the time.

The Court: The first time you saw it—what I am trying to get at—what happened that evening? He came home and you asked him about food and he said he didn't want any, he had some coffee and then he took a shower and went to bed?

The Witness: That is right.

The Court: Did you notice the swelling then?

The Witness: When he got to get in bed.

The Court: You noticed it when he got ready for bed the first time?

The Witness: Yes.

The Court: And that is when you put the liniment on him?

The Witness: It was alcohol that I used on him.

The Court: Alcohol, whatever it was.

The Witness: Rubbing alcohol.

(Testimony of Mrs. Hilda DeVaney)

The Court: Rubbing alcohol.

The Witness: Yes.

The Court: That is when you put the rubbing alcohol on him and not after he got up and went to the bathroom?

The Witness: He went to the bathroom and then he came back and I rubbed him down.

The Court: That is when you rubbed him down? [123]

The Witness: I rubbed him down, that is all I know.

The Court: You don't remember then?

The Witness: I think I rubbed him with alcohol.

The Court: Did he after that ever have any vomiting?

The Witness: Off and on; yes.

The Court: Off and on?

The Witness: Yes, he would eat and he would vomit.

The Court: Had he previously had any disturbance of that kind, any digestive disturbance?

The Witness: No.

The Court: He hadn't vomited?

The Witness: No.

The Court: All right.

Mr. Karen: No further questions.

Mr. Davis: Nothing further.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Karen: Mr. Anderson.

KENNETH ANDERSON,

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Kenneth Anderson. [124]

The Clerk: Your address?

The Witness: 919 Lomita Road, San Bernardino.

The Clerk: Take the stand.

Mr. Davis: May I make a suggestion, your Honor?

The Court: Yes.

Mr. Davis: In view of the fact that I don't know yet whether I have got to do something further about those payroll records, and we may get through this afternoon the way we are going, I wonder if we could check that now.

The Court: I think you might do that, and I will give you a recess so you can.

(Short recess.)

Mr. Davis: If the Court please, I understand that counsel is now willing to stipulate that if called, Mr. C. C. Shane would testify that the wages earned by Mr. DeVaney were those shown on Defendant's Exhibit D for identification, which I now ask to be introduced in evidence.

I might explain that for the month of July 1944 Mr. DeVaney's records show that he only worked 17 days

(Testimony of Kenneth Anderson)

during the month, but he took his vacation during that month, so that makes up the total for that month.

Mr. Karen: I also feel that I would like to bring Mr. DeVaney back to the stand again and explain about the vacation pay.

He has testified that for a period of the second half [125] of July he didn't work because he was off because of illness, and then this record shows that he received two weeks pay while he was off. That pay was vacation pay, and normally he would be working and receiving double pay, vacation pay and regular pay. In other words, the two weeks he was off was not because of his vacation but because he was indisposed, as he testified to.

The Court: You can produce Mr. DeVaney on the witness stand and straighten that out. This will be admitted in evidence.

Mr. Karen: No objection.

The Clerk: Defendant's Exhibit D.

(The document referred to was received in evidence and marked Defendant's Exhibit D.)

[DEFENDANT'S EXHIBIT D]

Los Angeles, August 18, 1945

Mr. M. R. Clark: (CC - Mr. James F. Cox)

Your letter August 16th, file 3020-44, following is information as to earnings, Brakeman Martin R. DeVaney:

	<u>1942</u>	<u>1943</u>	<u>1944</u>	<u>1945</u>
January	\$	\$	\$ 374.47	\$
February		72.86	402.68	
March		334.69	273.54	404.85
April		210.30	277.38	215.53
May		452.12	380.12	415.23
June		212.21	279.90	242.15
July		49.58	415.30	426.74
August		433.90	334.60	
September		336.36	487.73	
October	98.40	363.45	492.18	
November	362.06	334.33	136.13	
December	134.99	312.90		
Total	<u>\$595.45</u>	<u>\$3112.70</u>	<u>\$3854.03</u>	<u>\$1704.50</u>
Grand Total		\$9266.68		

G. C. Fish CCS

Case No. 4876-PH. DeVaney vs. U. P. R. R. Deft. Exhibit D. Date May 7, 1946. No. D Identification. Date May 7, 1946. No. D in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 12, 1946. Paul P. O'Brien, Clerk.

(Testimony of Kenneth Anderson)

The Court: Proceed.

Direct Examination

By Mr. Karen:

Q. Mr. Anderson, by whom are you employed?

A. Union Pacific Railroad.

Q. Were you employed by that company on or about January 21, 1944?

A. Yes, sir.

Q. In what capacity?

A. Brakeman.

Q. Where? [126]

A. On the San Bernardino-Yermo local.

Q. Is that the same local that Mr. DeVaney has testified to he worked on?

A. Yes, sir.

Q. Were you working the same hours that he worked?

A. Yes, sir.

Q. Drawing your attention to the evening of January 21, 1944, did you see Mr. DeVaney that evening?

A. Yes, sir.

Q. What time of the evening did you see him?

A. I did not see him from the time he went to work, which was some time in the afternoon.

Q. Did you see him at Cajon Pass?

A. Yes, sir.

Q. Where—

The Court: You have been present in the courtroom, have you?

The Witness: Yes, sir.

The Court: You heard the testimony concerning his falling off the train?

The Witness: Yes, sir.

The Court: Were you near there or do you recall the incident?

(Testimony of Kenneth Anderson)

The Witness: Yes, I do.

The Court: What happened? What did you see? [127]

The Witness: When the caboose came into the passing track I jumped off to line the switch back, and I saw DeVaney on his hands and knees some ways off from the switch, and he was trying to get up.

After I lined the switch back I asked him what was the matter. He told me he had fell off a car. He was out of breath so I helped him up. His lantern was off a ways from him, his hat and his brake club. I helped him up and helped him to the caboose.

By Mr. Karen:

Q. In what manner? A. Just walking with him.

Q. Did he lean on you for support?

A. Yes, sir.

Q. At that time did he say anything to you about being hurt?

A. Well, he was out of breath and he complained of his stomach hurting.

Q. You went to the caboose? A. Yes, sir.

Q. Then what happened there?

A. As I remember, DeVaney just sat on the caboose steps for a while and then got in the caboose and laid down.

Q. Do you know whether or not DeVaney worked the rest of the way to San Bernardino? [128]

A. He rode in the caboose for a while, and after that he got out. Whether he performed any duties or not, I don't remember, because I was a flagman, I was out from the train.

(Testimony of Kenneth Anderson)

Q. When you got to San Bernardino, what happened then?

A. We pulled in the yard and got off the caboose and went to our respective homes.

Q. Did you take Mr. DeVaney home?

A. No, but I believe I rode home. I am not even sure. He used to live by me and I don't remember whether I even rode home with him or not. He might have moved by that time. It is quite a while ago.

Q. Did you see Mr. DeVaney the next day?

A. Yes, sir.

Q. What time the next day? A. About 2:30.

Q. 2:30 in the afternoon? A. Yes, sir.

Q. Did you have any conversation with him about the accident?

A. I naturally asked him how he felt, and he said he felt all right except for a pain in the stomach, he had a slight pain in the stomach.

Q. Did he say anything to you about it being swollen?

A. He said he thought there was a swelling there.

Q. Then you took your usual trip that day, is that [129] right, up to Yermo? A. Yes, sir.

Q. Do you know whether or not Mr. DeVaney worked that day going up to Yermo?

A. Yes, he worked; he was on the job.

Q. When you got to Yermo, do you know of your own knowledge whether or not Mr. DeVaney went to see Dr. Ballachey?

A. Mr. DeVaney said he was going to see Dr. Ballachey.

(Testimony of Kenneth Anderson)

Q. He told you that at Yermo?

A. Yes, sir. And, as far as I know, he went over to see him.

The Court: Did you see him go or did you go with him?

The Witness: I didn't go with him but when he left me that is where he was going he said.

The Court: Was he headed in that direction?

The Witness: Yes, sir. We were just sitting in the beanery when he left.

By Mr. Karen:

Q. Did you see Mr. DeVaney at any time later after he said he was leaving for Dr. Ballachey's office, home?

A. I seen him, yes I seen him later.

Q. Did he say anything to you at that time?

A. Well, he said—

Mr. Davis: I object to the conversation. [130]

The Court: Sustained.

By Mr. Karen:

Q. Do you know whether or not after DeVaney returned from where he had been, whether or not he had been to see the doctor?

Mr. Davis: I object to that as calling for a conclusion of the witness.

The Court: Sustained.

By Mr. Karen:

Q. Did Mr. DeVaney complain in your presence or to you of any ill feelings, that is, that he was suffering from any pain on the 22nd of January after you left Yermo?

A. After we left Yermo?

(Testimony of Kenneth Anderson)

Q. Yes, to come back. In other words, what I am trying to get from you is, during the day of January 22, 1944, did you observe Mr. DeVaney's physical condition?

A. On the 22nd is the day we left San Bernardino.

Q. That is right.

A. And that is when I asked him how he felt, and he said his stomach was sore.

The Court: You left Yermo to go back on the 23rd?

The Witness: On the 23rd.

By Mr. Karen:

Q. On the 23rd did Mr. DeVaney evidence any pain in your presence? [131]

A. As close as I can remember, he did. From then on he complained so much about his side hurting him, and it has been so long ago.

Q. But you do know that from the time of the accident that he fell off the train, from that time on he was constantly complaining about the pain in his stomach, is that right?

A. Yes, sir.

Mr. Karen: No further questions.

Cross-Examination

By Mr. Davis:

Q. Isn't it a fact that he did not complain of injury at the time he fell off that car?

A. Well, his soreness in the stomach, that is what he complained of most, the night it happened and the next day.

Q. Do you remember making out a Form 2611 about this occurrence on May 2, 1944?

A. Yes, sir.

Q. Will you look at that—

Mr. Karen: I haven't seen this yet.

(Testimony of Kenneth Anderson)

Mr. Davis: Pardon me.

May I have it marked for identification?

The Court: Yes. It will be marked for identification.

The Clerk: Exhibit E for identification.

(The document referred to was marked Defendant's Exhibit E for identification.) [132]

Mr. Karen: That is okay.

By Mr. Davis:

Q. I will show you Defendant's Exhibit E for identification and ask you if the handwriting on the front is yours. A. Yes, sir.

Q. And the handwriting on the back of the form, is that yours? A. Yes, sir.

Q. Do you recall making that out? A. Yes, sir.

Q. Do you remember stating in this form, in answer to question 6-A, "What was done with and for the person?"

Answer: "Did not complain of injury at this time."

Then 6-B: "If not sent to hospital, why not?"

Answer: "Injury not known at this time."

You remember writing that in there, don't you?

A. Yes, sir.

Q. Then in answer to question 26, on the back: "Brakeman DeVaney mentioned to me at the time of accident that he had fallen off flatcar while we were pulling into Cajon passing track, but did not mention anything about being injured at this time."

Do you remember stating that? A. Yes, sir.

Q. Well, now, having your memory so refreshed—I [133] know it is a long time ago—Isn't it a fact that he did not make any complaint of injury of any sort on that

(Testimony of Kenneth Anderson)

evening but that two or three weeks later he started to complain?

A. Well, he didn't complain of any injury other than his stomach was sore.

Q. You don't call that an injury, do you?

A. He probably didn't know at the time.

Q. Did he attribute that soreness to having fallen from the car? A. Yes, sir.

Q. Wouldn't you call that an injury?

A. Well, I guess you would.

Q. As a matter of fact, you worked with Mr. DeVaney for quite a long time, didn't you? A. Yes, sir.

Q. Both before and after this accident?

A. Yes, sir.

Q. And of course since he has known that he had a hernia, he has complained, hasn't he? A. Yes, sir.

Q. Do you have any clear recollection at this time that he actually complained of pain in the abdomen on the night of this occurrence, or may you be confused?

A. All I know is that he said his stomach was sore that night. [134]

Q. You are sure he said that at that time?

A. He was all out of breath. He was holding himself even.

Q. Then what explanation have you for stating in here that he did not mention anything about being injured?

A. Well, he didn't know at the time whether he was injured or not, is the way I see it.

Mr. Davis: May I introduce this in evidence?

The Court: Admitted.

(The document referred to was received in evidence and marked Defendant's Exhibit E.)

[DEFENDANT'S EXHIBIT E]

REPORT OF PERSONAL INJURY TO EMPLOYEES,
PASSENGERS OR OTHER PERSONS.

Instructions.—A separate blank must be filled out for each person injured whether the injury is severe or slight, by each employe present. Every Question That Would Pertain to the Accident Reported Must Be Answered Fully. If blank spaces are insufficient for full statement, answer further in form of letter and attach hereto.

1. Name, residence (street and number) and P. O. address of person injured. Martin R. DeVaney
1105 La Junta St. San Bernardino

2. Age. 38 Occupation Brakeman

3. A. Married or single. Married If married, name and residence of wife or husband. Same

* * * * *

4. A. Employe, passenger, traveler on highway or trespasser? Employee If employe, how long in service of this Company, and in what capacity? 1 yr. 6 mo.

* * * * *

5. State fully the nature and extent of injuries. While getting off car at Cajon to roll train by, tripped on wire on flat car and fell to ground

6. A. What was done with and for the person? Did not complain of injury at this time. * * *

B. If not sent to hospital, why not? Injury not known at this time

(Defendant's Exhibit E)

C. Name and address of surgical attendant? Dr. J.
E. Ballachey first examined Bkm DeVaney

* * * * *

7. A. Date, hour (day or night), and exact point where
accident occurred. 10.25 PM. night of Jan. 21,
1944 while pulling into west Passing track Cajon.

B. If at night, was it very dark? Dark & Clear
Kind of weather. Clear

C. Did accident occur on or near a crossing?
No. * * *

* * * * *

G. On main or side track? Side track. Curve or
straight line? (State whether curve to right or
left.) Straight Up or down grade? Down grade

8. A. Train No. Ex W 5097 Conductor, yardmaster or
foreman. R. G. Brown

B. Engine No. 5097 Engineer. C. P. Sturgeon
Fireman. A. J. Dalmolin

C. ~~Baggage~~man Sw M. R. DeVaney Head Brake-
man. R. R. Hopkins Rear Brakeman and Por-
ter. K. D. Anderson

* * * * *

E. No. cars in train. 30 No. loads, 30 * * *
In what direction was train moving? West

F. Were all air brakes connected? If not, state why.
Yes.

* * * * *

(Defendant's Exhibit E)

- H. Speed of engine or cars at time of accident. 10
MPH. * * *
9. State your location with reference to point of accident. In Caboose
9. A. Were you an eye witness? No.
10. What was injured person doing at time accident occurred? Getting off car.
11. Give full particulars of cause of accident. M. R. DeVaney informed us he was getting ready to get off flat car which he was riding, to roll the train by. While walking to grab iron, he tripped on piece of wire & fell off side of flat car not knowing at the time that he was injured.
12. A. Was person injured while making coupling or uncoupling? No. * * *
* * * * *
14. A. Was there any defect in track, bridges, building, rolling stock, machinery, tools or other appliances, that caused, or may have assisted in causing the injury? If so, state fully. No
* * * * *
23. Was injured person insane, intoxicated, blind or deaf? No
24. Was anyone at fault? If so, who? No
25. Name, occupation, postoffice address, and residence of every person who witnessed the accident, or can give any information regarding it. (Attach hereto the written statements of such persons, signed by each.)

(Defendant's Exhibit E)

Name	Occupation	Residence and P. O. (Give street and number.)
Russell G. Brown	Condr	725 Laurel St. Colton, Cal.
Kenneth D. Anderson	Bkmm	1006 La Junta St. San Bdno.

26. Remarks: State fully any further information you can. Bkm DeVaney mentioned to me at the time of accident that he had fallen off Flat Car while we were pulling into Cajon passing track, but did not mention anything about being injured at this time.

(Sign here) Kenneth D. Anderson
 (Occupation) Brakeman
 (Address) 1006 La Junta, San Bernardino, Cal.

Month. Day of Month.

(Date) May 2 1944

* * * * *

Case No. 4876-PH. DeVaney vs. U. P. R. R. Defts.
 Exhibit E. Date May 7, 1946. No. E Identification.
 Clerk, U. S. District Court, Sou. Dist. of Calif. J. M.
 Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court
 of Appeals for the Ninth Circuit. Filed Sep. 12, 1946.
 Paul P. O'Brien, Clerk.

(Testimony of Kenneth Anderson)

Mr. Davis: That is all.

The Court: Have you ever had your wind knocked out of you?

The Witness: Yes, sir.

The Court: All right.

Mr. Karen: I think there are a few things in this report that should be brought out, your Honor.

The Court: It is in evidence.

Mr. Karen: I would like to ask the witness a question, or refer to a question that he answered in this report that was not brought out by Mr. Davis.

The Court: All right. [135]

Redirect Examination

By Mr. Karen:

Q. In answer to question 7-A there is written here "10:25 p. m."—strike that a minute.

I will start over again. In answer to question 6-C, "Name and address of surgical attendant," did you write this statement: "Dr. J. E. Ballachey first examined brakeman DeVaney"? A. Yes, sir.

Q. You have known Mr. DeVaney for a long time, haven't you? A. Yes, sir.

Q. What type of a man is he?

Mr. Davis: If the Court please, I object.

The Court: Objection sustained.

By Mr. Karen:

Q. Did you observe the place where Mr. DeVaney fell? A. Well, it was dark.

(Testimony of Kenneth Anderson)

Q. Do you recall whether or not there was a lot of debris around there?

A. No, I don't. There was a construction job up and down along there. There might have been at that time.

Mr. Karen: No further questions.

Mr. Davis: That is all.

The Court: Step down. [136]

(Witness excused.)

The Court: Next witness.

Mr. Karen: Mr. Hopkins.

ROBERT HOPKINS,

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Robert Hopkins.

The Clerk: Your address?

The Witness: 1196 Ninth Street, San Bernardino.

The Clerk: Take the stand.

Direct Examination

By Mr. Karen:

Q. Mr. Hopkins, by whom are you employed?

A. By the Union Pacific Railroad.

Q. Were you employed by that company on or about January 21, 1944?

A. Yes, sir; I was.

Q. You heard the testimony concerning an accident that happened that evening?

A. Yes, sir.

Q. What do you know about that?

A. Well—

(Testimony of Robert Hopkins)

Q. Before I get to that point, you were employed on [137] the same run as Mr. DeVaney was on that day, weren't you? A. Yes, sir.

Q. In what capacity?

A. I was the head brakeman.

Q. Now what do you know of that accident?

A. Well, I know nothing at all of the accident until after we had left Cajon and got to Devore, which is the next station below Cajon, where we stopped and made a regular inspection of the train.

At that point it is my duty, as a head brakeman, to go back and inspect the train until I meet the swing brakeman and then cross over and go back up to the engine.

Q. The swing brakeman would be whom on that night? A. Mr. DeVaney.

Q. Did you meet him? A. I did; yes.

Q. What happened there?

A. When I came to him, I don't remember the exact conversation, but he mentioned that he had fell off the train at Cajon and, as I say, I don't remember the conversation but I know he told me what car it was, and we went back and looked at the car, and he showed me the loose wires, and I took my brake club or my hands—I don't recall which it was—but we straightened the wires down, hooked them back on the truck, or bent them down so they wouldn't be dangerous [138] to anybody going over the car.

Q. Do you know whether or not Mr. DeVaney had been injured?

A. I don't know. I asked him what happened, and I recall his showing me his clothes where he had fallen, and as to the extent of his injuries, I don't recall whether I

(Testimony of Robert Hopkins)

asked him just where he was hurt or not, but I know it was quite a blow and he said that he had ridden in the caboose from Cajon down.

Q. Do you know of any time when Mr. DeVaney told you about a swelling in the abdomen?

A. Yes, I know that he told me that.

Q. When was that?

A. I am sorry, I can't place a definite date on it.

Q. Was it during the month of January?

A. As near as I can recall, it was right after the accident in my own mind. That is as close as I can place it. The trouble that he had with his side occurred right after the accident.

Q. Would you say it was a matter of days, a week?

A. As far as I can recall, I think it was, yes.

Q. Would you say a few days or a full week, or what?

A. Well, I would say right after the accident. It might have been two or three days; it might have been four or five days. [139]

Q. In other words, it was still during the month of January?

A. It was, as far as I remember.

Q. Did you have any occasion to observe his physical condition, that is, his abdomen?

A. No. You see, on the train employed as a head brakeman I was riding the engine all the time, and that was my position, and the other two brakemen were riding the caboose, and the only times that I would see him would be when we had work to do and when we got to our terminals.

(Testimony of Robert Hopkins)

Q. When you got to San Bernardino you heard Mr. DeVaney testify as to the transportation home. Did you drive him home?

A. I think I probably did. It was customary. I had a large car, sedan, and we usually always rode in my car.

Q. Did you see him the next day, or that same day, on the 22nd? A. The day after the accident?

Q. Yes.

A. Well, we got in there on the 22nd, I believe.

Q. That is right. Did you see him later that day?

A. Well, when I drove him home.

Q. How about later in the day?

A. When he went back to work, why he was on the job and I was on the job too. [140]

Q. Do you know whether or not he performed his regular work on the way back to Yermo?

Q. Well, I don't know what work he had to do because I was on the head end of the train, and if we had no setting out or picking up, I would have no occasion to see him.

Q. When you got to Yermo, do you know whether or not Mr. DeVaney saw Dr. Ballachey?

A. No, I don't.

Q. Do you know whether he went to see Dr. Ballachey?

A. Well, as has already been testified, it is about like Mr. Anderson, I was in the restaurant eating when he said he was going to go.

Q. You heard the same thing Mr. Anderson testified to here, is that right? A. I am quite sure I did.

Mr. Karen: No further questions.

(Testimony of Robert Hopkins)

Cross-Examination

By Mr. Davis:

Q. Did he say he was going to Dr. Ballachey because of the injuries received in this fall?

A. Well, I can't be definite on that. It was a long time ago. I don't remember exactly what he stated, or whether, as I said about the injury, whether it was two or three days or several days later.

Q. Was it in your mind when you were at Yermo there [141] the day after the accident that he was going to Dr. Ballachey on account of injuries?

A. Well, it has been a long time ago, and I associate the accident with the injury, and in my mind that is the way I feel, that he did go to Dr. Ballachey.

Q. Wasn't it your duty and the duty of the rest of the crew to make out a Form 2611 accident report right at that time?

A. I don't know. I am not familiar with that. I know they do make out the accident reports, and whether every member of the crew makes them out or not I don't know.

Q. Somebody is supposed to make an accident report out any time a man is found to be injured on duty, isn't that so?

A. That is what I understand; somebody is supposed to.

Q. And that would be the conductor at least?

A. Yes.

Q. Was the conductor in that restaurant at the time that you say Mr. DeVaney went to Dr. Ballachey?

A. I don't remember.

(Testimony of Robert Hopkins)

The Court: Tell me something about this wire on the flatcar. What were those, two Army trucks?

The Witness: Well, there were trucks on the car. I believe they were these big semis.

The Court: Semi truck and trailer?

The Witness: Just the tractor part. They call it a [142] semi. Just the two tractor parts were on there.

The Court: On the flatcar?

The Witness: Yes.

The Court: What was this wire, was it wire or rope or wire-rope?

The Witness: No, it wouldn't have been wire-rope because we couldn't have handled that. It must have been wire. It was customary to block the wheels, and then from the side of the car with the irons that stick out for posts, they would run wires to the spokes of the wheel, and some of these wires had broke loose where the truck had gone back and forth and broke the wires, and these wires were just hanging there loose.

The Court: That is on the flatcar, sticking up or hanging over the side, or what?

The Witness: They were just sticking up toward the truck.

The Court: Did you fasten the truck again?

The Witness: No, we had no way of fastening it. The wheels are blocked with curved blocks so they can't move, and I imagine wires are put on just as a safety precaution.

The Court: What is it, baling wire?

The Witness: It is heavier than baling wire, it is about like clothesline wire I imagine.

The Court: Like clothesline wire? [143]

(Testimony of Robert Hopkins)

The Witness: Quite heavy.

The Court: What do they call it, 8-penny wire, 9-penny wire?

The Witness: I really don't know.

The Court: You don't know?

The Witness: No.

The Court: About as thick as an 8-penny nail?

The Witness: I don't know the nail size. It is about the size of the lead in that red pencil, or just a little bit larger.

The Court: How many strands of wire were broken?

The Witness: I don't know.

The Court: How many did you fix?

The Witness: Well, the way they are wired on, they just run the wire through the spokes of the wheels, back and forth; they do it three or four times, so there is probably that many strands of wire.

The Court: What did you do?

The Witness: I believe we just took the wires off where they were broke.

The Court: Who is "we"?

The Witness: Martin DeVaney was there, and I don't recall whether he helped to untwist the wires, or whether I did it myself.

The Court: You took them off and threw them away? [144]

The Witness: I think we did; yes, just to make it so nobody would trip over it and fall.

The Court: Now that wire is the usual method of fastening the trucks, is it?

(Testimony of Robert Hopkins)

The Witness: Well, they use that and then they use this band steel to fasten down with too, but it is one or the other. They generally have one there.

The Court: Do these wires break often, or do you know?

The Witness: I have seen them before where they had broken.

The Court: All right.

By Mr. Davis:

Q. I will show you Defendant's Exhibit F for identification and ask you if the handwriting on the front is yours, Mr. Hopkins. A. Yes, I believe it is.

Q. And the handwriting on the reverse side, is that also yours? A. Yes, that is mine.

Q. That shows that it was made out May 12, 1944. Can you explain why it was so long after the time that Mr. DeVaney fell off the flatcar that you made this report?

A. Well, I think Mr. Taylor wrote and requested I make the accident report out. I believe that is why I made it out. [145]

Q. Now I will call attention to question 11: "Give full particulars of cause of accident."

Your answer: "I met DeVaney while inspecting train at Cajon siding. He told me how he had fallen from car and soiled clothing. Later he showed me car he had fallen from and the wires which he had more than likely tripped over. He did not state that he was hurt much at that time, but a few weeks later he complained about his side hurting."

You so stated in that form, did you not?

A. Yes.

(Testimony of Robert Hopkins)

Q. Now refreshing your memory from that statement, isn't it a matter of fact that Mr. DeVaney did not complain about his side hurting until a few weeks after the accident?

A. According to that statement, yes.

Q. What is your recollection?

A. May I ask if that was the report that was made with Mr. Aaronson?

Q. I haven't any idea. It speaks for itself.

May I introduce it, your Honor?

The Court: I thought it was already in evidence.

Mr. Davis: I just put it in for identification.

The Court: All right. Admitted.

The Clerk: F in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit F.) [146]

[DEFENDANT'S EXHIBIT F]

[Stamped]: Union Pacific Railroad Co. May 17, 1944
General Claim Dept.

REPORT OF PERSONAL INJURY TO EMPLOYEES, PASSENGERS OR OTHER PERSONS.

Instructions.—A separate blank must be filled out for each person injured whether the injury is severe or slight, by each employe present. Every Question That Would Pertain to the Accident Reported Must Be Answered Fully. If blank spaces are insufficient for full statement, answer further in form of letter and attach hereto.

1. Name, residence (street and number) and P. O. address of person injured. M. R. DeVaney
1105 La Junta St. San Bernardino, Calif. Brake-
man

(Defendant's Exhibit F)

2. Age. 38 Occupation. Married, Hilda DeVaney
1105 La Junta San Bedo Calif.

3. A. Married or single. Married * * *

* * * * *

4. A. Employe, passenger, traveler on highway or trespasser? Employe If employe how long in service of this Company, and in what capacity? Entered Service Oct 26 1942

* * * * *

5. State fully the nature and extent of injuries. Hernia resulting from falling off flat car. I don't know

* * * * *

7. A. Date, hour (day or night), and exact point where accident occurred. January 21 1944 about 10:25 PM at night, Cajon siding.

B. If at night, was it very dark? Yes Kind of weather. Dark and Clear

* * * * *

D. Was view of trainmen or injured person obstructed? If so, by what? State fully. I dont know

* * * * *

G. On main or side track? Near main track * * *
Up or down grade? Down

8. A. Train No. Extra 5097 West Conductor, yardmaster or foreman. R. G. Brown

(Defendant's Exhibit F)

B. Engine No. U P 5097 Engineer. C. P. Sturgeon
Fireman. A. J. Dalmolin

C. Baggage man. None Head Brakeman. R. R.
Hopkins Rear Brakeman and Porter. K. D.
Anderson

* * * * *

E. No. cars in train. I don't remember. * * *
In what direction was train moving? West

F. Were all air brakes connected? If not, state why.
Yes.

G. Was headlight burning? Yes. What kind of
headlight? Elec.

H. Speed of engine or cars at time of accident. 8 to
10 miles per hour * * *

9. State your location with reference to point of ac-
cident. I was in the engine gangway.

9. A. Were you an eye witness? No

10. What was injured person doing at time accident
occurred? Riding out in train

11. Give full particulars of cause of accident. I met
DeVaney while inspecting train at Cajon siding.
He told me how he had fallen from car and soiled
clothing. Later he showed me car he had fallen
from and the wires which he had more than likely
tripped over. He did not state that he was hurt
much at that time but a few weeks later he com-
plained about his side hurting.

* * * * *

(Defendant's Exhibit F)

13. Give initials and numbers of engines and cars immediately connected with this injury, and condition of same. If in bad order, were they so marked? Eng 5097
14. A. Was there any defect in track, bridges, building, rolling stock, machinery, tools or other appliances, that caused, or may have assisted in causing the injury? If so, state fully. Broken wires on flat car from which he fell.
- B. If there was a defect, how long had same existed?
Don't know * * *
14. C. Did injured person know of defects? I don't know
- * * * * *
20. What distance did engine or cars run after the accident occurred? We pulled on into Cajon siding
21. What does injured person say as to extent of his injuries? Says ruptured left side of abdomen
22. A. What does injured person say was cause of accident? Broken wire holding tractor on flat car caused his fall
- B. In whose hearing was statement made? He told me
23. Was injured person insane, intoxicated, blind or deaf? No.

(Defendant's Exhibit F)

24. Was anyone at fault? If so, who? No.

* * * * *

(Sign here) R. R. Hopkins

(Occupation) Bkman

(Address) 1111 La Junta, San Bernardino, Cal.

Month. Day of Month.

(Date) May 12 1944

Case No. 4876-PH. DeVaney vs. U. P. R. R. Defts.
Exhibit F. Date May 7, 1946. No. F Identification.
Date May 7, 1946. No. F in Evidence. Clerk, U. S. Dis-
trict Court, Sou. Dist. of Calif. J. M. Horn, Deputy
Clerk.

[Endorsed]: No. 11426. United States Circuit Court
of Appeals for the Ninth Circuit. Filed Sep. 12, 1946.
Paul P. O'Brien, Clerk.

The Witness: I made out a report with Mr. Aaronson.

By Mr. Davis:

Q. I am just asking you about this one.

A. Will you repeat the question again?

The Court: He wants to know whether or not it was
a fact that he did not complain until two or three weeks
after the accident or if, in fact, he complained as you
stated on direct within the week that he had a pain in his
stomach.

The Witness: Well, this report was made out some
time after the accident too and, as I said in my testimony,
when he had the pain. As I recall it, that is when I asso-
ciated his pain with the accident. And as to this state-

(Testimony of Robert Hopkins)

ment, why I don't know whether this was made out when I was with somebody else or copied from another report. I don't know.

By Mr. Davis:

Q. Your memory was fresh at that time, was it not, when you made that statement?

A. Well, this was made out when? In May?

Q. May 12th I think.

A. Well, that was, from June to May—that is quite some time—and at the time of the accident I wasn't particularly concerned with it other than he was just a member of the crew and I felt sorry for its having happened to him.

Q. Your memory was at least a good deal clearer at the time you made out that report than it is today, isn't that so? [147]

A. That would be quite possible; yes.

Q. Now did you have any reason to tell anything other than the simple facts and the truth of the matter when you made out that statement?

A. No, no more than I have now.

Q. You say that you met DeVaney at Devore, as I understand it today? A. Yes.

Q. But on that statement you say you met him at Cajon siding.

A. According to this statement, I did; yes.

Q. Now wasn't your memory more clear about that and isn't it a fact that you met him at Cajon siding?

A. Well, taking this as better testimony than what I am giving now, it shows that I must have met him there, at least I said that I did.

(Testimony of Robert Hopkins)

The Court: What is your recollection now? Did you meet him at Devore or Cajon?

The Witness: To tell you the honest truth, I don't remember whether it was Devore or Cajon. This says Cajon and I said Devore in my previous testimony. As far as swearing as to which it is—I am under oath now—I couldn't say.

By Mr. Davis:

Q. Whereabouts did you meet him, whereabouts on the train? [148]

A. It was near the rear of the train. As the train was going by I get off and let five or six cars go by and keep on walking back until I meet the swing man.

Q. He was walking up alongside the train when you met him?

A. He come down on that side, the side we inspect on first.

Q. That was his duty, to come forward to meet you?

A. Yes.

Q. And you went backward to meet him?

A. Yes.

Q. And on the occasion when you met him, whether it was at Cajon or Devore, that is what he was doing, his regular job, wasn't he?

A. Well, he was out there. I suppose he was out there for that purpose.

Q. The following day, didn't he do his regular job?

A. Well, I stated I was on the head end of the train and my work kept me up there and I don't know what he was doing.

(Testimony of Robert Hopkins)

Q. As I understand it, when you stop it is your duty to go back and his duty to come forward.

A. Not customarily, no. Just at the inspection points coming down Cajon Pass.

Q. How about going up? [149]

A. No, I don't go back.

Q. How about going up Cajon Pass?

A. No, I stay right on the engine.

Q. How about going down the other side to Yermo, don't you make an inspection on the other side?

A. No, no inspection points are there.

Q. Not on the up trip, is that right?

A. That is right. On the trip to Yermo there is no points where the head brakeman makes an inspection.

Q. But on the way back then you make an inspection?

A. Make an inspection at Cajon and Devore.

Q. Now this accident happened on January 21st?

A. Yes.

Q. I understood you went to Yermo on the next day, the 22nd.

A. Yes.

Q. Then you returned from Yermo to San Bernardino on the 23rd, is that right?

A. Yes.

Q. And on the 24th you would be going back to—wait a minute—on the 23rd you would be making your trip from Yermo back to San Bernardino, wouldn't you?

A. On the 23rd; yes.

Q. And you would be making inspections on that return trip? [150]

A. Oh, yes. We always inspected the train.

Q. Did Mr. DeVaney do his part of the job on that occasion on the 23rd?

A. Well, I don't remember about that.

(Testimony of Robert Hopkins)

Q. Do you remember any time when you, for instance, made the inspection of the whole train to save him?

A. I made inspections of the whole train?

Q. To save him.

A. Well, I don't know whether was for that purpose or not. We sometimes made coffee in the caboose and I would let the train roll by and have some coffee and inspect the other side.

Q. You heard his testimony that the rest of the members of the crew helped him out with his work for a long period of time. Is that a fact or not?

A. I know that I have tied brakes down when we were setting out cars and picking up cars, letting brakes off, because of the fact that he had complained about his side hurting him.

Q. When was the first time that you ever did such a thing?

A. I can't say.

Q. How close to the time of the accident, have you any memory?

A. No, I can't. [151]

Q. It was at least several weeks afterwards, wasn't it?

A. I wouldn't say that, because I don't know. I can't be definite.

The Court: Did Mr. DeVaney have coughing spells?

The Witness: Not to my recollection. We had colds. The incident that he brought up, we all went to Dr. Nivin, I was in on that too, and we all had cold shots.

The Court: Was Mr. DeVaney a frequent sufferer of colds which caused him to cough?

The Witness: Well, I don't know about that.

The Court: Did you ever notice it?

The Witness: I never noticed it particularly.

(Testimony of Robert Hopkins)

The Court: Do you make a report every time anybody slips or falls on the train?

The Witness: No.

The Court: Or cracks his head with a monkey-wrench?

The Witness: If they are seriously hurt we do.

The Court: Suppose they crack their head with a monkey-wrench and they don't know whether they have broken a bone or not. Do you make a report then?

The Witness: No, sir.

The Court: In other words, you don't make a report unless you consider that it is an injury?

The Witness: That is right. I never make a report. [152]

The Court: All right.

By Mr. Karen:

Q. Mr. Hopkins, do you know whether or not Mr. Brown, the conductor of the train, knew about this accident?

A. No, I don't. I was on the head end of the train.

Q. You don't know whether he made a report of it either, do you? A. No, I don't.

Mr. Karen: That is all.

Mr. Davis: Just a minute.

Cross-Examination

By Mr. Davis:

Q. If a man is seriously hurt enough so that he goes to a doctor about it, aren't you required to make a report?

A. I know now that you are; yes.

Q. That has been the rule though for years and years?

A. I haven't worked with the company for years and years.

(Testimony of Robert Hopkins)

Q. Well, it was the rule at that time, wasn't it?

A. I wouldn't say. I found out afterwards that it was, but at the time I didn't know whether it was or not.

Mr. Davis: All right.

Mr. Karen: I just happened to think of something. May I ask another question?

The Court: We will see. [153]

Redirect Examination

By Mr. Karen:

Q. You mentioned something about when you made that report, whether it was made before a Mr. Aaronson or not. That report was made in the presence of somebody from the company, isn't that right?

A. I don't remember.

Q. Well, you stated that you may have copied somebody else's report, as to whether or not he complained two weeks later or not. Is that possible?

A. Well, I mentioned—

The Court: Is it possible? We don't want to know whether it is possible; we want to know what actually happened.

By Mr. Karen:

Q. Do you know whether or not you actually copied somebody else's report? A. No, I don't know.

Mr. Karen: That is all.

Mr. Davis: That is all.

The Court: That is in your handwriting?

The Witness: Yes, sir.

The Court: Step down.

(Witness excused.) [154]

The Court: Next witness.

Mr. Karen: I want to put Mr. DeVaney on again to clarify that one point there.

The Court: All right.

MARTIN R. DeVANEY,

recalled as a witness in his own behalf, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Karen:

Q. Mr. DeVaney, you have testified that during the month of July you only worked approximately 17 days, is that right? A. That is right.

Q. Yet in this Defendant's Exhibit D it states here that you earned \$415.30 in that month. Now do you have any record as to how much of that was for actual work and how much of that was for other reasons?

The Court: What other reasons, vacation?

Mr. Karen: Vacation.

The Witness: I know my vacation pay was—it was just for a 7-day period—and it run about \$141 for the seven days.

By Mr. Karen:

Q. You took your vacation during the month of July?

A. I took my vacation; yes. [155]

Q. And you received pay for it?

A. I received pay for it; yes, sir.

Q. However, you did testify that during the time you were off, during the month of July, that was primarily caused by your illness, is that right?

A. I laid off sick and turned in the time for my vacation, and continued on sick until the 1st of August, and used my vacation to rest up.

(Testimony of Martin R. DeVaney)

Q. If you hadn't been sick would you have continued to work?

A. We could take our vacation pay and work anyway. That would be double pay for the week.

Q. That little book that you have there, which is Plaintiff's Exhibit No. 3, was that kept in your normal daily work?

A. That was kept right up to date according to the way I worked. All of us kept it in the caboose and put our time in it.

Q. Did you make notations in that every day?

A. Every day.

Q. Did you make a notation in there on or about January 22, 1944? A. January 22nd; yes, I have.

Q. What does that notation say?

A. "Reported to doctor, Yermo." That is a notation [156] of the accident.

The Court: Let me see that.

(The document referred to was passed to the Court.)

The Court: Did you write that on there at the time?

The Witness: Yes, sir. Everything in there, your Honor, is written at the time it happened. It is worn out with age.

By Mr. Karen:

Q. Mr. DeVaney, there is in evidence as a plaintiff's exhibit—I have forgotten the number now—but a letter from a Mr. Taylor. Did you ever write a letter to Mr. Taylor?

(Testimony of Martin R. DeVaney)

The Court: That was covered on direct.

Mr. Karen: I just found a copy of the letter to Mr. Taylor, of which that purports to be an answer. I just happened to notice it in my file.

The Court: Show it to him and ask him if it is the letter.

Has counsel seen it?

Mr. Davis: No, I haven't seen it.

(Exhibiting document to counsel.)

By Mr. Karen:

Q. Did you write this letter? A. Yes, sir.

Q. Is this the original letter or a copy of the letter you mailed to Mr. Taylor? [157]

A. It is a copy of the letter I wrote to Mr. Taylor. The original Mr. Taylor has.

Q. And this explains the answer to it?

A. I always write two letters of everything because sometimes it might get lost, so I always keep a copy for myself.

Mr. Davis: I suppose technically it wouldn't be admissible, not being the best evidence, but I won't object.

Mr. Karen: It ties in with the other letter, your Honor. I offer that in evidence.

The Court: Admitted.

The Clerk: No. 5.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 5.)

[PLAINTIFF'S EXHIBIT NO. 5]

1219 West 10th St.
San Bernardino, Calif.
February 8, 1946.

Mr. Geo. W. Taylor
Senior Assist Supt.
Union Pacific R. R.
Los Angeles, Calif.

Dear Sir:

On or about January 23rd and May 20th accident reports concerning injuries I sustained at Cajon Station were sent by me to your office.

Since you have on file three copies of each report, I wish you would send me a copy made by my own hand for my personal file.

Sincerely

Martin R. De Vaney
Brakeman.

Case No. 4876-PH. DeVaney vs. U. P. R. R. Plfs.
Exhibit No. 5. Date May 7, 1946. No. 5 Identification.
Date May 7, 1946. No. 5 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 12, 1946. Paul P. O'Brien, Clerk.

(Testimony of Martin R. DeVaney)

Mr. Karen: No further questions.

Cross-Examination

By Mr. Davis:

Q. Mr. DeVaney, did you take a vacation in 1944?

A. That was the first year we were allowed our vacation, I believe; 1944.

Q. Did you take a vacation in 1944?

A. I just took that. I asked for that time for my vacation.

Q. What time?

A. That time in July; I asked Mr. Shane. [158]

Q. I understood that was July of 1945, wasn't it?

The Court: 1944 he is talking about, the year of the accident.

Mr. Davis: I see.

Q. How about 1943?

A. In 1943 that hadn't been approved. That was our first year that we were granted a vacation, in 1944. Then when I got back from the hospital I did the same thing, I used my vacation time to rest up after I got out of the hospital and they allowed me that week for that time.

Q. I notice on the third page here a notation, "sick, hernia," opposite the dates of August 26, 27, 28, 29, 30 and 31 of 1943. I wonder if you would explain that.

A. It couldn't be 1943 because I was on the Mira Loma job at that time.

Q. But that says "sick, hernia," doesn't it?

A. It says '43 up here. But I was on the Yermo local from the time I started to work for the Union Pacific; that is, from the same time Mr. Brown was on. I went on

(Testimony of Martin R. DeVaney)

that in December of '43 and stayed on the Yermo local until I was bumped off there in '45. So this would be '45 instead of '43.

The Court: '45 or '44?

The Witness: '45.

The Court: You were sick with a hernia in '45?

The Witness: I was bumped off the Mira Loma job in May [159] or June of '44, your Honor. I was on the Mira Loma job at the time I was taken out of service and discharged over that testimony this morning.

By Mr. Davis:

Q. This book starts in the beginning, doesn't it, with 1943?

A. Here is the way it starts. It starts here. You see, I ran out of paper so I went and turned it around and started over again, left a few loose pages here. I think the back runs as far as September, then it goes to the front of the book to October. You see here is August. The book will go back to the forward part. This is a continuation of August, and there is no September, and then it comes to October and December just before you get to January. I started too far in the middle of the book to begin that.

Mr. Davis: All right. That is all.

The Court: Let me see the book.

(The document referred to was passed to the Court.)

By Mr. Davis:

Q. Just one more question. I understood you to say this morning that you went back to work after the operation on March 16th.

A. I believe it was March 16th.

(Testimony of Martin R. DeVaney)

Q. You earned \$404.85 in that month. What explanation have you for that? [160]

A. \$404 in the month of March?

Q. Yes.

A. I went to work March 16th and made one trip with conductor Russell, and I was off three trips, and then I worked the balance of the month.

Q. As a matter of fact, didn't you work the whole of that month?

A. Dr. Gamette didn't release me until the 15th of March.

Q. Didn't Dr. Gamette let you return to work on the 16th of February?

A. Oh, no. He kept me out 90 days and then told me not to go back until after—I was going back to work and I was just too weak and I would break out in sweats, and he told me to stay home a little longer.

Mr. Davis: That is all.

The Court: What does "Dog catch Lynwood" mean in your book here in March?

The Witness: That is if a crew was on duty over 16 hours, we would go out and take over their train and bring them in. That is just a railroad man's term, a dog catch.

The Court: Here in an entry on the second half of March, the 15th to 31st—I suppose that is 1944 because it appears to be interspersed with some of the other months of 1944—you have "entered" written in there after the date [161] 18. Can you explain that?

A. I can explain that. I always show why I am off, and I just put that in there that way. Some places I

(Testimony of Martin R. DeVaney)

showed "sick" or "hernia." I just wrote it down so I would have my own record as to why I was off.

The Court: There was another item here that I wanted to ask you about but I can't find it now.

You have after February 21 and 22 "Dr. Nevin." Would you say that is the first time you saw him?

A. That I put in last night because I was trying to refresh my memory in my mind. I was trying to find out when I saw him bring it to a date.

The Court: Then all the entries in this book were not made at the time?

The Witness: There is only two entries made in there last night, one back there where it says "Dr. Gamette," and the one in there which says February 16 to 21st, where I put in "Dr. Nevin." I was trying to get the exact date when I went there to help the record, because I have no records, otherwise just my memory.

The Court: You have some kind of a claim paid here, "2 days \$6.66" in July. What is that? I can't read it. It is some kind of a claim paid.

The Witness: I can't remember what that is.

The Court: That is all. Any other questions? [162]

Mr. Karen: No.

Mr. Davis: No.

The Court: Step down.

(Witness excused.)

Mr. Karen: I had one more witness, Dr. Gamette. However, that was just as to the operation. I understand that Mr. Davis wants to call him also as a witness for certain other things.

Do you intend to call Dr. Gamette?

Mr. Davis: No.

Mr. Karen: I don't need him as a witness. I don't think I will need him. We have the hospital records. There is nothing he can testify to.

The Court: Do you want him?

Mr. Karen: No, I don't want him.

The Court: Do you rest?

Mr. Karen: Yes.

The Court: The plaintiff rests.

Mr. Davis: If the Court please, we only have five minutes. Maybe we can start our case in the morning.

The Court: I think that will be a good idea.

Mr. Davis: May I consult a witness just a minute? I understand Mr. Brown may want to get away.

We might finish with Mr. Brown, if the Court wants to go [163] ahead.

The Court: You can't finish with a witness in five minutes.

Mr. Davis: I doubt it.

The Court: So I guess Mr. Brown will have to come back tomorrow and forego the day at Yermo.

Recess to 10:00 o'clock in the morning.

(Whereupon, at 4:25 o'clock p. m., a recess was taken until 10:00 o'clock a. m., Wednesday, May 8, 1946.)
[164]

Los Angeles, California; May 8, 1946; 10:00 O'Clock
A. M.

The Court: Ex parte?

The Clerk: No ex parte, your Honor.

The Court: Very well. DeVaney v. Union Pacific.

Mr. Davis: Mr. Brown, will you come forward?

RUSSELL G. BROWN,

called as a witness by and in behalf of the defendant,
having been first duly sworn, was examined and testified
as follows:

The Clerk: Your name, please?

The Witness: Russell G. Brown.

The Clerk: Your address?

The Witness: 765 West Laurel Street; Colton, Cali-
fornia.

The Clerk: Take the stand, please.

Direct Examination

By Mr. Davis:

Q. Mr. Brown, you are a conductor for the Union
Pacific Railroad Company, are you? A. Yes.

Q. On what date were you promoted to that position,
approximately?

A. Approximately in September of 1942.

Q. Prior to that time had you been a brakeman for
the Union Pacific? [165] A. Yes.

Q. Since what time? A. October 21, 1939.

Q. Previous to that, had you had other railroad ex-
perience of various types? A. Yes.

Q. Since what time? A. Since 1931.

(Testimony of Russell G. Brown)

Q. Were you the conductor in charge of a train westbound which arrived at Cajon about 10:25 p. m. on January 21, 1944? A. Yes.

Q. That train started west from Yermo, did it not?

A. Yes, sir.

Q. Where did you ride the train from Yermo to Barstow, for instance? A. I rode the engine.

Q. From Barstow on where did you ride?

A. On the caboose.

Q. At the time that the train starts from Yermo, has it been thoroughly inspected by car inspectors at that point? A. Yes.

Q. What are the usual stops made by a train of that sort between Yermo and Cajon?

A. Well, on a local, the usual stops are sometimes [166] Naples—that is a station in between Yermo and Barstow—for setting out purposes; and it is always customary to stop at Barstow to get orders to run over the first district from Barstow to San Bernardino, and the only other customary stops outside of unknown delays would be Summit to place retainers in proper position, and Cajon for inspection, and Devore for inspection.

Q. How about Victorville, don't you usually stop there?

A. That is not a stop that you would make under all conditions. If you had a heavy enough train to require a helper, you would stop there and get a helper, or you would most likely take water at Victorville due to the grade.

(Testimony of Russell G. Brown)

Q. At all these stops, what is the duty of the head brakeman and the swing brakeman to do?

A. It is their duty to inspect the train and look it over as time will allow.

Q. For what purpose? What are they looking for?

A. Any defect in the equipment as to the running gear, etc.

Q. Suppose the wire holding a tractor to a flatcar were broken, flopping loose, would that be the type of defect that they would be looking for?

A. Yes, if it was a defect that might cause injury it should be taken care of, and would be taken care of.

Q. You say between Yermo and Summit, would it be fair- [167] ly certain that the train would have been inspected on both sides by the head and swing brakemen?

A. Yes, it would be most probable that it would have been looked over.

Q. And if any defect of this type were located, it would be rectified at that time? A. Yes.

The Court: What time did you leave Yermo on this particular trip?

The Witness: I believe it was about 2:00 p. m. That was generally our time of call out of Yermo.

The Court: Then what time was it on this trip? What was your last stop before Summit?

The Witness: On this particular trip, if I remember right, our last stop was at Victorville.

The Court: What time of day was that?

The Witness: That was in the evening.

The Court: After dark?

The Witness: I believe it was around 8:00 o'clock. I imagine it was after dark.

(Testimony of Russell G. Brown)

The Court: And between Yermo and Victorville you had had how many stops?

The Witness: I am not quite sure but I believe we stopped at Helendale, and Oro Grande, and then Victorville. That would be two stops between Barstow and Victorville. [168]

By Mr. Davis:

Q. Then from Summit on you would be in the caboose?

The Court: Excuse me just a minute, while I am on that.

Your stop at Oro Grande, if you hit Victorville at 8:00 o'clock, would that have been in daylight or in dark?

The Witness: That would be quite hard to say.

The Court: It isn't far, is it?

The Witness: It is only a few miles, and it is possible it could have been just before dark.

The Court: The last stop then, could you say when the last stop was when the inspection of the train was made in daylight that day?

The Witness: I couldn't positively say; no.

By Mr. Davis:

Q. Did the swing brakeman and head brakeman have lanterns, electric lanterns? A. Yes.

Q. What type of electric lanterns were they?

A. Well, they have different types. They are an electric hand lantern and they have two electric bulbs in them. That is a requirement of the Santa Fe Railroad. They throw quite a good light.

Q. They have a metal reflector around the bulbs, do they? A. Yes. [169]

(Testimony of Russell G. Brown)

Q. From Summit on to, we will say, San Bernardino, where was your usual place of riding on the train?

A. In the caboose.

Q. On arrival at Cajon on this particular evening, January 21st, do you recall of anything unusual occurring?

A. No.

Q. I believe you were here in the courtroom when it was testified that Mr. Anderson helped Mr. DeVaney up from the ground and took him over to the steps of the caboose. Is it likely that you would have seen him do that or at least have seen DeVaney on the caboose?

A. Well, it is probable that I would have; yes.

Q. I suppose you might have gotten off on the other side or something of that sort, but it is probable that you would?

A. I could have gotten off the front of the caboose.

The Court: At Cajon you left the caboose and went to the head of the train?

The Witness: I am not positive. Sometimes I did look the train over and if I had other things to do, if I remember correctly, we were in there for other trains, to let other trains pass, and it is possible that I might have gone to the telegraph office to secure information that they might have there for me.

The Court: In which event you would go back to the ca- [170] boose or to the engine?

The Witness: It is according to how much time I had there. If I had time I would have probably gone on and looked the train over.

The Court: Do you have any recollection of what you did that night?

(Testimony of Russell G. Brown)

The Witness: No, I have not.

The Court: At that stop?

The Witness: At that stop, I have no recollection.

By Mr. Davis:

Q. If you had looked the train over, what would that mean?

A. Well, it would just have meant that I would have made a personal inspection of the train.

Q. As I understand it, you had been up near the engine when you were at the telegraph office, if you went there, somewhere in that neighborhood?

A. Not necessarily. It would all depend on where the train was setting on the passing track.

Q. We will say that the caboose—I believe it has been testified that the caboose in this case stopped somewhere near the east switch of the passing track—and your train that night was about how long?

A. Thirty cars.

Q. Where in that event would the engine be with refer- [171] ence to the telegraph office?

A. Well, as a rule the engine would be about 35 cars from the telegraph office, because after the caboose comes in off the main line and comes in over the fouling points, that is, the clearing point, we would swing them down and stop, and it would be somewhere in the vicinity of the telegraph office.

Q. Really what I was trying to get at was, where would you ride the train from Cajon to Devore?

A. I would ride in the caboose.

(Testimony of Russell G. Brown)

Q. No matter whether you went to the telegraph office or not?

A. Yes, regardless of where I went, I would ride the caboose out of there.

Q. Now on that evening when you rode the caboose between Cajon and Devore, did you see Mr. DeVaney lying down in the caboose? A. No, I didn't.

Q. Were you in a position where you would have seen him if he had done that? A. Yes.

Q. Suppose you had seen him lying down in the caboose between Cajon and Devore, would that have been an unusual circumstance? A. Yes. [172]

Q. What was it his duty to do between Cajon and Devore?

A. It is the swing brakeman's duty to ride in the middle of the train.

Q. Is that according to the Santa Fe operating rules?

A. That is according to the Santa Fe operating rules.

Q. And they apply over that joint trackage?

A. Yes.

Q. If therefore he had been in the caboose sitting up or lying down or anything else, would that have been an unusual circumstance? A. Yes.

Q. Would you have inquired the reason for it?

A. Yes.

Q. If he had told you then that he had fallen from a flatcar at Cajon and that he didn't feel like doing his regular work as a result, what would it have been your duty to do?

A. It would have been my duty to send a flash wire to all concerned and also upon arrival at San Bernardino

(Testimony of Russell G. Brown)

I would have made out and had ready a Form 2611, Union Pacific accident report.

Q. Did you have an occasion for making that flash wire and that Form 2611 that night? A. No.

Q. Did Mr. DeVaney act as a regular member of your [173] crew for some time after January 21, '44?

A. Yes.

Q. And did he at some time mention to you that he felt that he had sustained an injury on January 21, 1944, at Cajon?

A. Yes, I believe it was about a month after that that he mentioned to me that he had fell off of a car previous to that time, and asked me what he should do about it, and I told him, "Well, if you are injured, why you must make out an accident report to cover it." That is in accordance with the rules.

Q. Do you know whether or not he did then make out an accident report?

A. No, I don't know whether he did or not.

Q. You were called on afterwards to make one, weren't you?

A. Yes, I received a wire from the assistant superintendent requesting me to file one immediately.

Q. And you did so? A. I did; yes.

Q. Now between January 21, 1944, and the date when Mr. DeVaney told you that he felt he had been injured on that day, did you notice anything in Mr. DeVaney's conduct or actions to suggest that he had been injured?

A. No, I didn't notice anything irregular about his work. [174]

(Testimony of Russell G. Brown)

Q. He continued to do his regular job?

A. Yes.

Q. I think you have heard testimony that Mr. DeVaney went to see Dr. Ballachey on the next trip back to Yermo, which would be January 23rd. Do you know anything about that? A. No.

Q. If you had known that he had gone to Dr. Ballachey on account of falling from this flatcar, would you have made an accident report at that time?

A. Yes, I would have.

Q. Would you be subject to discipline in any way if any member of your crew were injured in that fashion?

A. Yes, if I didn't file proper reports I would be subject to discipline.

Q. I mean, if you did file proper reports, would there be anything that would subject you to discipline about the way in which he was hurt?

A. No, I wouldn't be subject to discipline under those conditions.

Q. Let me put it this way: In case of doubt as to whether an accident report should or should not be filed, what would you do as a matter of custom and practice on your part?

A. I would try to find out if he was injured, if I [175] knew anything about it at all, and then I would file a report.

Q. What I have in mind is this, I suppose that there would be injuries of such a minor nature that you would not feel it necessary to make out a report. That is true, isn't it? A. Yes, that is true.

(Testimony of Russell G. Brown)

Q. On the other hand, suppose an injury is of such nature as to call for attention by a doctor, is there any doubt about reporting such an injury?

A. No, there is no doubt about that.

Q. Now if there were a doubt as to whether you should or should not report such an occurrence, which course would you choose?

A. I would report it.

Mr. Davis: I think that is all.

The Court: Cross examine.

Cross-Examination

By Mr. Karen:

Q. Do you know or remember whether on this particular return trip from Yermo up to Cajon pass, whether or not on that particular night an inspection had been made at any point along the trip? I am not referring to what was customary, but do you remember on that particular night that there had been an inspection made?

A. No. [176]

Q. Now isn't it true, Mr. Brown, that it is customary for the head brakeman and the swing brakeman each to take a side on inspection?

A. Yes, it is customary to have both sides of the train looked over.

The Court: In that fashion?

By Mr. Karen:

Q. In that fashion? A. Yes.

Q. In other words, you heard Mr. DeVaney testify that he always went down the right side, the head brake-

(Testimony of Russell G. Brown)

man always went down the left side, that was his custom? You heard him say that?

A. I heard him say that, but I disagree there in this respect, the head brakeman is on the engine and the swing brakeman is on the caboose. When they make an inspection it is customary for the head brakeman to walk back on the same side until he meets the swing brakeman, then they both go through the train and then they both walk back on the opposite side.

Q. But it is possible though that Mr. DeVaney would be passing this flatcar on the right side if that was his custom and he did that, is that right?

A. It is possible.

Q. Now isn't it true, Mr. Brown, that as this train [177] proceeds down Cajon Pass toward San Bernardino, that many times during that trip down there is slack in the train and it catches up and there is slack causing the cars to suddenly jerk and stop, and jerk all the way down that hiss, isn't that true?

A. Not on a train of that length.

Q. Is it possible?

A. It is possible, but not probable.

Q. Did you see those wires, Mr. Brown?

A. No, I didn't.

Q. You don't know what condition they were in, do you?

A. No, I don't know how long a distance these two particular trucks had traveled on that flatcar to your knowledge?

A. No, I have no knowledge of that.

Q. Do you know of your own knowledge whether or not those trucks were loose on there? A. No.

(Testimony of Russell G. Brown)

Q. Isn't it possible that these supporting wires, if they were in a poor condition, that they might snap or break coming down that hill or some place along that particular route? A. It is possible.

Q. And even though an inspection had been made prior of Cajon Pass, that something might have happened coming down the hill that would have caused those wires to break and for [178] the car to come loose, for that truck to come loose on there? A. Yes.

Q. In your experience as a trainman, those things happen? A. Yes, they happen.

Q. Isn't it true, Mr. Brown, that when you arrived at Cajon Pass that as you got off the caboose you got off on the opposite side from which Mr. DeVaney claims he had fallen, isn't that right?

A. I couldn't say which side I got off of.

Q. Picturing the train going down that hill, or facing toward San Bernardino in that direction, did you get off the right side of the caboose or the left side of the caboose? A. That I couldn't say.

Q. Well, is the station on the right side of the caboose or the left side? A. It is.

Q. On which side? A. On the right.

Q. On the right side? A. Yes.

Q. And when you got off the caboose you went immediately to the station, is that right?

A. I am not positive whether I did or not. [179]

The Court: I understood the witness to say that he didn't have any particular and specific recollection of that particular evening, that he has testified to what his custom is.

(Testimony of Russell G. Brown)

Is that correct?

The Witness: That is correct.

By Mr. Karen:

Q. You don't remember whether you got off that night or went to the station or did ride the caboose or walked up to the head of the train?

A. I remember riding the caboose, but I don't remember whether I went in the station or whether I walked up and looked at the train or just what my particular work was at that time.

Q. Your memory of what occurred that night is vague at this particular time, is that right?

A. Yes.

Q. Isn't it true, Mr. Brown, that you did have a conversation with Mr. DeVaney immediately after the accident?

A. No.

Q. Isn't it true that he said to you that he had fallen off the train and asked you whether he should make a report or not, or whether you should make a report, and you said to him, you suggested to him that he should go to a doctor first?

The Court: You say that is not true? [180]

The Witness: No, he didn't mention it to me or I would have made out a report.

By Mr. Karen:

Q. You know, as a matter of fact, don't you, Mr. Brown, that there are many, many times accidents that occur, call them accidents, in which a man bruises an arm, the trainman bruises an arm, or hurts his fingers, or maybe stubs his toe, and an accident report is not made of that; isn't that true?

A. That is true.

(Testimony of Russell G. Brown)

Q. And in your capacity as conductor you are a representative of the Union Pacific Railroad, isn't that right?

A. That is correct.

Q. That is, in your jurisdiction over the other trainmen, you are acting as a representative of the company?

A. That is correct.

Q. And it is to your benefit that a perfect safety record be kept, isn't that true?

A. That is true.

Q. And if too many accident reports are turned in that reflects on your record, doesn't it, as a conductor?

A. Not necessarily.

Q. Isn't that true?

A. It doesn't reflect on my record necessarily.

Q. They look to you to find out why there are so many accidents as conductor, don't they? [181]

A. I have never been asked about it yet.

Q. But do you know whether or not that is the rule?

A. No, I know of no rule to that effect. I know that safety is of first importance in the discharge of duty to all members of the train crew.

Q. You have known Mr. Anderson and Mr. Hopkins for some time, haven't you? A. Yes.

Q. You heard them testify to this court?

A. Yes.

Q. To an accident happening that night?

A. Yes.

Q. Do you have any doubt in your mind as to whether an accident did happen or not that night?

A. I couldn't say whether it did or not.

(Testimony of Russell G. Brown)

Q. In your knowledge of these men and association with them for some length of time, working with them day after day, would you have any reason to believe that they were lying on the stand?

Mr. Davis: I object to such a question.

The Court: Sustained.

By Mr. Karen:

Q. Isn't it true, Mr. Brown, that railroad men in the nature of these men and yourself are prone to disregard what would be called a slight accident? [183]

A. Well, yes and no.

Q. Which is it?

A. If it was slight enough that the man didn't feel that he needed any medical attention, I feel that he would disregard it; if he felt that he needed medical attention, I *fell* that he would have seen a doctor and made the proper reports.

Q. That is right. You stated on direct examination that you do not remember seeing Mr. DeVaney in the caboose on the rest of the trip to San Bernardino.

A. That is correct. I don't remember seeing him.

Q. Is it possible that he could have been there?

A. I believe I would have seen him if he had been there.

Q. Your memory is quite clear on that point, but it is vague on the other points, is that true?

A. Well, as I have said before, that is a violation of the rules and I would have had cause to notice any irregularities of that kind.

Q. At that particular time in 1944, you men were working pretty hard schedules, is that right?

A. That is right.

(Testimony of Russell G. Brown)

Q. Due to the war? A. Very long hours.

Q. Now when you say a month later Mr. DeVaney told you [184] he had been injured, you told him to make a report, is that right?

A. I told him if he was injured he was required to make a report; yes.

Q. But you didn't make a report at that time, did you?

A. I didn't know whether he was injured or not.

Q. But he told you he was?

A. Well, I didn't know that he was ruptured.

Q. Then it was part of your duty to make a report.

A. He told me that he had fallen off of a car and I told him that if he felt he was injured he would have to make a report to cover it, and so would I.

Q. That is true. You have said that before.

A. In compliance with the rules.

Q. But you did testify that you didn't make a report until you were asked to by a company representative?

A. No, I didn't. I didn't know if he was injured. I had no way of examining him myself. I am no judge that he was injured.

Q. In your normal work on the train, if a man comes to you and says, "I fell off a car, I don't know whether I have been injured or not, I think I am injured, or I am injured," it is your duty to make out a report?

A. If he says I am injured, or thinks he is injured, I will make a report; yes. [185]

(Testimony of Russell G. Brown)

Q. Therefore you did violate your duty when you didn't make a report when he told you he was injured and had a hernia?

A. I don't recall him telling me he was injured and had a hernia.

Q. Let's have it then, what did he tell you a month later?

A. He told me he fell off a car and hurt himself, but I don't know what the extent of his injuries were.

Q. Let's take the part about falling off the car. If a member of your crew says he fell off a car, and nothing else, isn't it your duty to make a report on that?

A. If he is injured, it is my duty. If it is a reportable injury there must be a report made to cover it.

Q. Isn't it true, Mr. Brown, that you don't like to make out reports, that it is a lot of red tape?

A. No, that isn't the case. I make out my reports. I am paid for that work, if it becomes necessary.

Q. Mr. Brown, isn't it true that in your normal trip down the pass you do not go into a siding at Cajon unless you are expressly ordered to do so by the operator at that station?

A. Not by the operator.

Q. Or by whoever has the authority to make it?

A. The train dispatcher. [186]

Q. The train dispatcher? A. Yes.

Q. On this particular occasion you were ordered into a siding for a particular reason, is that right?

A. That is right.

Q. Therefore it would be your duty to go to the train dispatcher to find out what the reason was, isn't that right?

A. No, not necessarily.

(Testimony of Russell G. Brown)

Q. What did you do in that event?

A. You see, they run these trains on train orders and they might give you an order to head in at Cajon and let first and second 3 by—that is just an illustration—a couple of trains, passenger first-class trains, and after those trains have gone if the board isn't red and you don't get anything on it when you go in, you leave.

Q. You do go in to look at the board?

A. No, you don't go in to look at the board.

Q. How do you find out how many trains are to go by? A. You have an order that says to let them by.

Q. Where do you get the order?

A. You might get the order at Victorville or Summit. It could be given to you at any point along the line.

Q. It could have been given to you at Cajon too?

A. No, it could not have been given at Cajon.

Q. What kind of a signal tells you to proceed ahead?

[187] A. Clear; green.

Q. There is a light there?

A. That is correct, also an arm on an order board, if that is what you are referring to.

Q. You did make out a report of this accident, didn't you? A. Yes.

Mr. Karen: Have you the report, Mr. Davis?

Mr. Davis: Yes.

Mr. Karen: May I see it?

(The document referred to was passed to counsel.)

By Mr. Karen:

Q. I show you a Form 2611, report of personal injury to employee, passenger or other persons—

The Court: Mark it for identification.

(Testimony of Russell G. Brown)

The Clerk: No. 6.

(The document referred to was marked Plaintiff's Exhibit No. 6 for identification.)

By Mr. Karen:

Q. Do you recognize that as being your handwriting?

A. Yes.

Q. You signed that report? A. Yes.

Q. Is that your signature? A. Yes. [188]

The Court: What date is it?

Mr. Karen: Dated May 2, 1944.

Q. Is that correct? A. That is right.

Q. Now, Mr. Brown, in your answer to question 5 you have written here—the question is “State fully the nature and extent of injury”—and you have written in your own handwriting: “While getting off car at Cajon to roll train by—”

Is that the correct word, roll? A. Yes.

Q. “—tripped on wire on flatcar and fell to ground.”

6-A: “No injuries noticeable at this time.”

6-C: “Name and address of surgical attendant. Dr. J. E. Ballachey first examined brakeman DeVaney.”

Is that true? A. Yes.

Q. In answer to question 11: “Give full particulars of cause of accident. Mr. DeVaney informs me he was getting ready to get off flatcar which he was riding to roll train by while walking to grab iron tripped on piece of wire and fell off side of flatcar not knowing that he was injured at the time.”

Do you remember writing that? A. Yes.

Q. Question 26, Remarks, and you wrote here: “I had no [189] knowledge of the accident at the time it

(Testimony of Russell G. Brown)

happened. Brakeman DeVaney notified approximately one month later of these facts said he did not mention it at the time it happened because he did not think he was hurt."

One month later, that would be February, approximately February 21st, to make it pretty close, is that right? A. That is correct.

Q. And you made this report out in May?

A. That is correct.

Q. Is that right? A. Yes.

Mr. Karen: I would like to offer this in evidence.

Mr. Davis: No objection.

The Court: Admitted.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 6.)

[PLAINTIFF'S EXHIBIT NO. 6]

REPORT OF PERSONAL INJURY TO EMPLOYEES, PASSENGERS OR OTHER PERSONS.

Instructions.—A separate blank must be filled out for each person injured whether the injury is severe or slight, by each employe present. Every Question That Would Pertain to the Accident Reported Must Be Answered Fully. If blank spaces are insufficient for full statement, answer further in form of letter and attach hereto.

1. Name, residence (street and number) and P. O. address of person injured. Martin R. DeVaney
1105 La Junta St. San Bdn. B
2. Age. 38 Occupation. Brakeman

(Plaintiff's Exhibit No. 6)

3. A. Married or single. Married If married, name and residence of wife or husband. Same

* * * * *

4. A. Employee, passenger, traveler on highway or trespasser? Employee If employee, how long in service of this Company, and in what capacity? 1 yr. & 6 mo.

* * * * *

5. State fully the nature and extent of injuries. While getting off car at Cajon to Roll Train by. Triped on wire on Flat Car & fell to ground

6. A. What was done with and for the person? No injury noticeable at this time * * *

B. If not sent to hospital, why not? Not known

C. Name and address of surgical attendant? Dr. J. E. Ballachey first Examined Bkm De Vaney

* * * * *

7. A. Date, hour (day or night), and exact point where accident occurred. 10 25 pm night 1:21:44 Pulling into west Passing Track Cajon

B. If at night, was it very dark? Dark & Clear Kind of weather. Clear

C. Did accident occur on or near a crossing? No * * *

* * * * *

G. On main or side track? Side Track Curve or straight line? (State whether curve to right or left.) Straight. Up or down grade? Down grade

(Plaintiff's Exhibit No. 6)

8. A. Train No. Ex W 5097 Conductor, yardmaster
or foreman R. G. Brown

B. Engine No. 5097 Engineer. C. P. Sturgeon
Fireman. A. J. Dalmolin

C. ~~Baggage~~man Sw. M. R. DeVaney Head Brake-
man. R. R. Hopkins Rear Brakeman and Por-
ter. K. D. Anderson

* * * * *

E. No. cars in train. 30 No. loads. 30 * * *
In what direction was train moving? West.

F. Were all air brakes connected? If not, state why.
Yes.

* * * * *

H. Speed of engine or cars at time of accident. 10
M.P.H. * * *

9. State your location with reference to point of
accident. In Caboose

9. A. Were you an eye witness? No

10. What was injured person doing at time accident
occurred? Getting off car

11. Give full particulars of cause of accident. M. R.
DeVaney informs me he was getting ready to get
off Flat Car which he was riding to Roll train
by while walking to grab iron triped on piece of
wire and fell off side of Flat Car not knowing
that he was injured at the time

* * * * *

(Plaintiff's Exhibit No. 6)

12. A. Was person injured while making coupling or uncoupling? No * * *

* * * * *

14. A. Was there any defect in track, bridges, building, rolling stock, machinery, tools or other appliances, that caused, or may have assisted in causing the injury? If so, state fully. No.

* * * * *

23. Was injured person insane, intoxicated, blind or deaf? No

24. Was anyone at fault? If so, who? No.

25. Name, occupation, postoffice address, and residence of every person who witnessed the accident, or can give any information regarding it. (Attach hereto the written statements of such persons, signed by each.)

Name	Occupation	Residence and P. O. (Give street and number.)
Russell G. Brown	Condr	725 Laurel St. Colton Calif
Kenneth D. Anderson	Bkm	1006 La Junta St San Bdn

26. Remarks: State fully any further information you can. I had no knowledge of accident at time it happened Bkm. DeVaney notified approx 1 mo later of these facts Said he did not mention it

(Plaintiff's Exhibit No. 6)

at the time it happened because he did not think
he was hurt.

(Sign here) R. G. Brown

(Occupation) Condr

(Address) 725 Laurel St. Colton Calif.

Month. Day of Month.

(Date) May 2 1944

* * * * *

Case No. 4876-PH. DeVaney vs. U. P. R. R. Plfs.
Exhibit No. 6. Date May 8, 1946. No. 6 Identification.
Date May 8, 1946. No. 6 in Evidence. Clerk, U. S. Dis-
trict Court, Sou. Dist. of Calif. J. M. Horn, Deputy
Clerk.

[Endorsed]: No. 11426. United States Circuit Court
of Appeals for the Ninth Circuit. Filed Sep. 12, 1946.
Paul P. O'Brien, Clerk.

By Mr. Karen:

Q. Is the statement there that Dr. Ballachey first ex-
amined Mr. DeVaney, where did you receive that in-
formation?

A. I imagine I received it from Mr. DeVaney.

Q. In other words, on February 21st when he made
this report to you, he told you at that time that he had
seen Dr. Ballachey, according to your statement, on Feb-
ruary 21st, or approximately that date, 30 days after
the accident? A. Yes. [190]

Mr. Karen: I think that is all.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Davis: The defendant rests, your Honor.

The Court: The defendant rests. Any rebuttal?

Mr. Karen: Just a moment, your Honor.

(Conference between plaintiff and counsel.)

Mr. Karen: I would like to have Mr. DeVaney take the stand for a few questions.

MARTIN R. DeVANEY,

called as a witness in his own behalf in rebuttal, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Karen:

Q. Mr. DeVaney, do you recall that at any time, say within six months prior to the accident and six months after the accident, that you had a cold which resulted in severe coughing?

A. No, sir.

The Court: You mean you don't recall?

The Witness: I didn't have any colds, any more than just a little common head cold, if any, which is normal; no [191] severe coughing of any kind.

By Mr. Karen:

Q. You do recall that?

A. I seldom cough when I have a cold; it is just a little head cold.

Q. You heard Mr. Brown testify that he did not see you in the caboose from Cajon to San Bernardino. Did you see him in the caboose?

A. I saw Mr. Brown. There had to be a reason for us to go in that passing track and he would have had to

(Testimony of Martin R. DeVaney)

have the orders, or whatever it was, to get to the engine to get out of there. We just can't go in a passing track and drive out without authority.

Q. What happened then?

A. Well, the reason we went in there that night was because they had a derailment at Cajon Station—I mean at Barstow yard—wait a minute.

Q. Take your time.

A. They had a derailment at the precooler yard at San Bernardino, and we had to stay in Cajon Station about an hour or an hour and a half until they could allow our train to come down and enter the yard.

Q. And how does that relate to Mr. Brown?

A. Mr. Brown would have had to see me at each station to find out the condition of the train and give me further in- [192] structions because we still had one more station in which we might have had to set cars out, at Ono. That was a Government supply base and our local supplied that base every trip going west most of the trips.

Q. What happened that night in relation to this normal procedure?

A. After I was hurt I stayed in the caboose. I don't remember whether we set out at Ono or not. I was in the presence of Mr. Brown. He wouldn't leave the station without knowing where all the crew were. He would have to know where each one of us was. After I met Hopkins I usually tell him and the other members of the crew—we have a way of relaying it to the conductor—that we are all ready to leave. There might be something wrong with the engine that he might not know

(Testimony of Martin R. DeVaney)

about. We have to go back and tell him. It is the swing brakeman's duty to tell all those things.

Q. In the caboose, did you have a conversation with him?

A. I told him I was hurt and I stayed in the caboose.

Q. And you saw him there?

A. I saw him there.

Q. And he saw you?

A. Yes. We were there for an hour and a half.

Q. And Anderson was there; is that right?

A. Anderson was there. He is a flagman. He is right [193] on the caboose all the time.

Q. After you went back to the flatcar with Hopkins, did you make an examination of the wires?

A. Yes, I did.

Q. In what condition were they?

A. There were strands of wires about the size of a spike—that would be the circumference—and these wires are about three or four to a strand, and then they are fastened to the floor and run up through the spokes of the wheel, and then twisted and run back down again. They were broken right off and stuck up just like hooks.

Q. What color were they?

A. They were black and weatherbeaten. It is hard to say what color they were. These Army trucks were sent out here from way back somewhere in Utah, some big base in Utah, and a lot of our equipment was all snow-covered. This was all in January and the winter months of the year. They were just black and corroded.

(Testimony of Martin R. DeVaney)

Q. Did you have occasion to make an inspection of those wires coming down Cajon Pass?

A. I inspected the train and all, as far as my duties required, but coming down Cajon Pass we don't inspect any more after we leave Victorville. We set our retainers on our train to hold the train back at Summit. That has to be done pretty rapidly in order not to tie up the main line. Then we go [194] right on down the hill.

Q. And as this train came down the hill, did it have occasion to jerk and stop?

A. They always do that. The descending grade there is about 4200 feet from Summit to San Bernardino, and that is only about 18 miles. That is quite a drop.

Q. You ride those cars, or you had been riding them, quite often? A. All the time.

Q. And you know that to be a fact?

A. Yes. Even passenger trains jerk coming down that steep incline.

Mr. Karen: No further questions.

Mr. Davis: No questions.

The Court: Step down.

(Witness excused.)

The Court: Does the plaintiff rest?

Mr. Karen: The plaintiff rests.

The Court: All right. Who wants to argue first?

Mr. Karen: I will take the last say.

The Court: You waive your opening argument?

Mr. Karen: Then I would be limited probably to what he brings out, is that right?

The Court: I am not quite that formal. [195]

Mr. Davis: What if I should waive my whole argument?

Mr. Karen: That is right. I had better open then. After four years away I am not used to this. I don't know what is going on.

I will try and be as brief as possible, your Honor, because I think the testimony has been very clear. There is very little confusion.

There is no question at all that the accident did occur, that Mr. DeVaney did fall off a car at the time mentioned and the date mentioned.

The Court: From your point of view, the thing that puzzles me and is in my mind—I don't think there is any doubt about the fact that he fell off the car—is the reconciliation of his falling from the car when he might have received the rupture to the statements in his later report which he made out, that he noticed a swelling in his testicles and pain in the groin after sexual intercourse with his wife some month or so later.

Mr. Karen: I am going to elaborate on that a little.

Of course the point has not been opposed, or the fact rather, that Mr. DeVaney suffered other injuries, that is, a broken tooth and a hurt knee. There has been no testimony to show that that did not result from the fall. Therefore I think I have established that part sufficiently.

The Court: There hasn't been any testimony about how [196] much injury or pain or damage he suffered from it either.

Mr. Karen: I think there was very little pain or suffering from that point in comparison to the other.

The Court: The whole case is on the question of his hernia.

Mr. Karen: As to whether or not this hernia was caused by the fall. There is no question but that there was a hernia and that there was an operation.

Now the defendant company, in my opinion, has attempted to confuse the Court with these statements. These men, these railroad men, Mr. DeVaney, Mr. Anderson, Mr. Hopkins, and Mr. Brown, are all hard working men, hard working railroad men, and have been railroad men for a long period of time. They work sometimes 16 hours a day. They are hardened to their jobs. They don't cry about hurts. They minimize their hurts. And it has been brought out that in this particular setup, the railroad company and a company of this kind, these men are completely under the subjugation of this company as far as their work is concerned. They can't get off work, they are afraid to even make reports, they are afraid to say things because they might be laid off, they might be fired. It is their livelihood.

Now Mr. Anderson, Mr. Hopkins, Mr. DeVaney and Mrs. DeVaney, have all testified that he did have an injury to his abdomen immediately after the fall. There is his little [197] book. In spite of the fact that there is one notation that he made the other day, and which he readily admitted, but the rest of it was made in the regular course of his employment. You can see by the writing that it was. It is exactly the same as the other entries made way back there. And it says in that little book "Saw doctor, Yermo."

Why did he see the doctor at Yermo? Dr. Ballachey has no memory. Dr. Nevin doesn't remember. Of course they are company employees. That must be taken into consideration.

The Court: They are busy men too.

Mr. Karen: They are busy men. But it was wartime. Dr. Ballachey said that if they came in he would take care of them.

Now together with that report, the entries in his little journal there, we do have the exhibit—I have forgotten which one it is—which is a copy of a letter sent to Mr. Fish, superintendent of the Union Pacific Railroad, asking—

The Court: Well, you have a letter here from the claim agent, G. W. Taylor, in which he states:

“Referring to your letter of February 8th requesting that I return to you a copy of accident reports made out by you concerning injuries to you occurring on January 23rd and May 20th:

“Those reports were forwarded at the time they were received to other departments and am [198] unable to comply with your request.”

I don't know what the date of May 20th refers to here.

Mr. Karen: That was another report. He meant March 20th, I believe.

(Addressing the defendant): Is that right?

The Defendant: March.

Mr. Karen: It is our contention that Mr. DeVaney has testified that he did make a report on January 21st.

The Court: How could he be talking about an accident occurring on March 20th when the report was written on February 13th?

Mr. Karen: He is referring to reports made, your Honor.

The Court: I know that, but this was written on February 13th.

Mr. Karen: 1946.

The Court: In 1946?

Mr. Karen: That is right. That is when he started looking for copies of his reports. That is when he wrote to Mr. Taylor asking for a copy to be returned to him. Mr. Taylor acknowledged that the report was there and that he had sent it on.

There was a report that Mr. DeVaney has testified to that he made on January 23rd, together with the fact that he has testified that he saw Dr. Ballachey, together with the testimony of all the other people, which indicates that there [199] was an injury to his abdomen on that date.

Now let us say, for example, that the swelling didn't occur until three weeks later. There has been no evidence shown here that anything happened to break the causation between the accident and this protrusion or this swelling. It is a normal way in which a hernia appears in a normal case, according to what the doctors say, that if a man is injured that some time later the protrusion will come through. There are unusual cases where there is an immediate eruption, and Dr. Ballachey, in answer to my question, stated that the immediate swelling could have been by the blow and that the other swelling could have been, or was of course as a matter of fact, the actual hernia. There has been nothing to break that causation between the accident and the actual diagnosis that it was a hernia. As a matter of fact, Dr. Ballachey told Mr. DeVaney at the time of the first examination, "You have got a hernia."

Now in Mr. Brown's own report, his own statement—and Mr. Brown says he doesn't remember very much—in his own statement he says 30 days later—

The Court: There isn't any doubt but that Dr. Bal-lachey found that the plaintiff here had a hernia when he made the examination on the medical insurance, which was when?

Mr. Karen: February 16th.

The Court: In February? [200]

Mr. Karen: Yes.

The Court: And that was before—

Mr. Karen: March 4th when the statements were made.

The Court: —any of these reports were made?

Mr. Karen: That is right.

The Court: When was the earliest report?

Mr. Karen: March 4th, according to this record.

Now to reconcile what all these men stated in their reports, and what they stated on the stand, there is the presumption that they are telling the truth today on the stand here, and each one of them had a reasonable explanation as to why they made these other statements, because in their mind an injury to them means when a man is lying on the road with his head split open, or something which is very serious. They didn't consider this thing an injury, when he said his stomach hurt on that day. That is why several months later, when these claim agents came around, not only one but two and three came around, representatives of the company, and practically put the words in the mouths of these men as to what happened—that is their job—it is the same way with Mr. DeVaney. We asked him why he made that statement. Because he was afraid to be fired. They told him everything is going to be taken care of, don't worry. After the operation you will be compensated for it. That is what Mr. Ford said to him. This man

was completely at ease feeling that every- [201] thing was going to be taken care of.

Then all of a sudden everything is denied him and we have this lawsuit.

Now I don't believe that the Court should come to the conclusion that these men were all lying as to what happened on January 21st, as to whether or not he did have a pain, as to whether or not he did have a swelling there. I think in this particular case there is clear evidence that the two things tied together, and even assuming that there was no pain at that time, there is nothing to show that the particular hernia that came up to a bigger swelling three weeks later was not caused by this fall. Mr. Davis is talking about coughs, colds. That is nothing but a red herring, as far as I am concerned, because naturally they are going to say that.

Mr. Davis coughed here when he was examining Mr. Brown. I thought to myself, he might get a hernia.

Mr. Davis: I got it from that cause.

Mr. Karen: So that came to my mind.

Your Honor, I think that in this particular case there has been proof of the establishment of negligence in that a proper place was not provided for this man to work. He walked along this particular left side of the flatcar, to put out a fire, or to investigate a fire, and here were these loose wires lying there that caught his pants leg, and in the sudden jerk of the train, and the movement of the train, the loose [202] truck knocked him overboard.

That certainly, in my opinion, was not a safe place for an employee to work. And so far as negligence on his part is concerned, the rule is clear, of course, that contributory negligence is no bar to recovery. There

was no question here, or no evidence introduced to the defendant, that the plaintiff was contributory negligent.

I think that in this particular case the question of negligence has been clearly established, the question of causation as to whether or not the fall caused this hernia has been clearly established, I think there has been a sufficient explanation of the discrepancy between the statements and the testimony here under oath, and these men were under oath. Mr. Brown, the only witness that the defendant has, is certainly biased. He is the conductor of the train. It is his record that is important to be kept clear. The safety record always reflects on the conductor.

He said he didn't know. Well, that, as a matter of fact, is not the truth. He doesn't like to make out reports. They don't like to enter into all this red tape with the railroad companies and fill out all these reports and have these investigations, because they want to keep on working.

In this particular case it was unfortunate that no official report was made immediately after the accident. All these reports were made in March and May and some even later. [203] Naturally memories become distorted, and somebody says something, and you think, yes, I guess it was two weeks later, I guess it was a month later. Mr. Brown himself stated that even 30 days later Mr. DeVaney told him he had been injured by a fall and he didn't make out a report until May, which goes to show he was reluctant to make out reports.

I think, your Honor, in this particular case that Mr. DeVaney has clearly shown he lost a considerable amount of time due to the injury.

The Court: How much?

Mr. Karen: He lost 177 days, according to the testimony from his records. I also attempted to bring out that his relationship with his wife isn't the same now as it was then, but maybe after a man has had seven children it doesn't make any difference.

But then again he does feel pretty much hurt about it. His life isn't the same. He is a comparatively young man. Naturally he hasn't suffered any expense for hospital treatment, because that was taken care of. He paid for that through his group insurance policy. But he didn't receive the kind of care that he should have received under the regulations of the company. They didn't provide proper transportation to the hospital.

The Court: Are you asking for damages on that account? It isn't so listed in your complaint. [204]

Mr. Karen: I am relating that to his general discomfort. And he was sick all during this period of time. He should have had an operation 30 days after he saw Dr. Gamette.

And, by the way, where is Dr. Gamette? I thought he was going to be here today. But there was no explanation why the operation wasn't performed until November 8th. All during this time this man tried to work. He worked even though he was in pain. He worked in order to keep his family together, but he was off quite a bit of time too.

I think, your Honor, in this particular case Mr. DeVaney should be compensated for his injuries and suffering.

The Court: Mr. Davis?

Mr. Davis: If the Court please, with respect to the time off, to start at the last end, examination of the monthly wages of Mr. DeVaney show that in 1943 he

had the habit of working heavily one month, lightly the next month, heavily the next month, lightly the next month. His total wages during 1943 I think were \$3100. His total wages in 1944 were about \$3800. On the face of it, that doesn't seem to me to show any diminution in wages on account of this occurrence. And he has had no medical expense.

Counsel says, why isn't Dr. Gamette here. Of course he had him under subpoena and could have had him if he wanted to. I didn't call him because I think all we need from Dr. Gamette is shown by the hospital records. [205]

With respect to a hernia, it is shown in the hospital records that when operated on he had what is called a preformed sac, a congenital condition, thin in diameter but with very thick walls. That, as I understand it, is a congenital condition and of course may be caused to protrude by any number of causes.

One cause might possibly have been a fall from the flatcar on his abdomen. I think, however, it would have to be a pretty peculiar sort of a fall to result in the increased abdominal pressure which accounts for protrusion of a preformed hernia.

As I understand a hernia, it is the increased pressure within the abdomen which causes the protrusion, such as is caused by heavy lifting and contracting of the muscle wall, such as that emphasized by—well, both Dr. Nevin and Dr. Ballachey.

The Court: It may be that coupled at the same time with a blow upon the wall of the abdomen.

Mr. Davis: Well, you would have to have the muscular contraction certainly. Now that may be associated with a fall such as he had or it may not.

It can also be caused by coughing, which I can testify to, and I know that when the protrusion occurred I was in no doubt about it right then and there, and I was operated on shortly thereafter. I think that is an ordinary experience. [206] Certainly a man who has a protrusion caused by a particular occurrence is going to notice it in less than three weeks.

But examining the hospital records again and going back to Mr. DeVaney's own statements, he says that it was the testicle that he first noticed, and that was two or three weeks afterwards.

The Court: He says that in his statement, he doesn't say that on the witness stand.

Mr. Davis: No. I am speaking of the statement, your Honor, and the history given at the hospital was that he first noticed the injury or the pain in the testicle, the swelling, and that it was a week afterwards when he found out about the hernia.

Now I know one thing for certain—we all do—if he had sustained an injury to the testicle at the time he fell from the flatcar there wouldn't have been any question about his being knocked out right then and there. I think we have all had enough experience to know that. There wouldn't have been any doubt in anybody's mind that he was injured right then and there. Of course that condition can be caused by a fall or anything else.

The Court: It can be caused later by a hernia.

Mr. Davis: Not the injury to the testicle, as I understand it.

The Court: I think it can cause swelling. [207]

Mr. Davis: Oh, it can cause swelling, but not swelling of the testicle. It could cause swelling of the scrotum

but not swelling of the testicle itself, I don't believe. However, that is a medical question.

The Court: We haven't any evidence on it.

Mr. Davis: No.

The Court: I don't think there is any doubt but what the wires were broken. The evidence is clear and positive on that.

Mr. Davis: That is true.

The Court: There isn't any doubt but what he fell off the train.

Mr. Davis: Okay.

The Court: And there isn't any doubt but what he suffered something that night. I think the testimony is clear that the man came back and picked him up and there isn't any conflict at all upon that.

Mr. Davis: I think that is true.

The Court: There isn't any doubt but that on February 16th, at least outside of his own testimony, he had a hernia.

Mr. Davis: That is right.

The Court: And there isn't any doubt but that he ultimately had a hernia.

Mr. Davis: Yes.

The Court: The only doubt that is cast upon the cause of [208] the hernia in his statement in these reports that he noticed it after sexual intercourse with his wife. I think it is perfectly within the realm of possibility that the hernia might have been caused by his fall, and he might have had a slight strangulation after sexual intercourse with his wife, although the hernia might have been present.

Mr. Davis: I don't doubt that.

The Court: I mean, by a strangulation or a protrusion through the inguinal ring so as to cause him greater pain and discomfort. But I think he could have had his hernia because you have hernias in all degrees. In other words, the muscles can separate over a long course or wide course or they can be slightly bruised and injured so that they can become weakened and then some other strain, or sudden exertion of any kind, can part them. I don't see how I can escape a conclusion that there was causal liability on the part of the railroad.

Mr. Davis: Now, if the Court please, I haven't discussed that point.

The Court: Let's hear that.

Mr. Davis: I was arguing the other theory, that I don't think the man suffered any damage in any way from this fall.

The Court: I think that he did.

Mr. Davis: All right.

As to the liability in the case, we are charged with attaching those tractors to the flatcar with wires of a certain [209] description. There isn't a scintilla of evidence that we ever attached the tractors to the flatcars.

The Court: Don't you think that the presumption should be indulged in that you did?

Mr. Davis: Of course not.

The Court: The railroad did?

Mr. Davis: No.

The Court: Why not?

Mr. Davis: They were Government tractors. If there is any presumption, the presumption is that the Government attached them.

The Court: Well, wasn't the Union Pacific Railroad the carrier?

Mr. Davis: Why, yes.

The Court: Does the shipper load his own freight?

Mr. Davis: He does.

The Court: And attaches it?

Mr. Davis: He does. But that isn't up to me to show, that is up to the plaintiff. There isn't any evidence and there couldn't be any presumption of that sort at all, if the Court please.

Suppose we did. Is there anything to show that these wires were broken at such a time as to cause the railroad company to have notice thereof and an opportunity to remedy the defect, if any? [210]

The Court: Is that an essential point?

Mr. Davis: Absolutely, if the Court please. In any sort of negligence, certainly when a defective condition comes into question and someone is charged with the responsibility of maintaining that condition, it has to be shown that the condition existed for such a length of time and under such circumstances as to impart constructive notice or else it must be proven by the plaintiff that the defendant had actual notice of that defect.

The Court: I cannot go along with you completely on that statement of law, because the defect might be by virtue of not using strong enough wire, if it was the duty of the railroad to have attached them there so that they wouldn't break.

Mr. Davis: There has been testimony to this effect, your Honor, that the tractors were customarily attached either by this sort of wire or by iron bands and that that was the customary and regular way of doing it; that due to the movement of the train and the freight on the

flatcars, and both types of attachment I suppose are likely to break at times, but there isn't any testimony that there was anything in that equipment, the nature of the wires used, there isn't any testimony to show who used them.

The Court: What have you got to say about that?

Mr. Karen: You mean right now? [211]

The Court: Yes.

Mr. Karen: On that particular point, your Honor, the question of negligence has been, under the Federal Employer's Liability Act, held to be either the commission of an act of negligence or the omission on the part of a railroad company—not railroad company but in this case a railroad company—to do something which would in a particular case have been sufficient to amount to the same as ordinary negligence under the state law.

In other words, you don't have to prove, for example, that somebody, whoever it was, put the cars on, put these trucks on the flatcar. There is no question about it, that the railroad company supervises and tells the Government, in this particular case, how these cars should be attached, how these trucks should be attached, and at that point they are supposed to be attached properly so that they can finish out the particular trip to destination.

Now in this particular case there has been testimony that these wires were dark, they were dark wires, they were rough wires. In other words, the way they were twisted around the spokes of the wheel and coming down to the bottom of the flatcar in itself constitutes a hazard.

The Court: Let us assume that the wires were bad wires, that they were faulty wires, and that they shouldn't have been used or that better wires should have been used. Counsel [212] makes the point that it was not the obliga-

tion of the railroad, the defendant here, to have placed any wires on there, or to be responsible in any way for the loading of that flatcar.

Mr. Karen: Oh, yes.

The Court: And that it was no part of its appliances, machinery or other equipment.

Mr. Karen: On that particular point I don't see how they can say that it wasn't their duty, because it is the duty of the particular carrier, I mean they hand instructions to whoever does the loading, in this particular case the Government, and in most cases they load the stuff themselves.

The Court: What is the evidence of their instructions on the loading?

Mr. Karen: Well, in my research of the whole question, all I had to do was present evidence that there was negligence in the way these wires were on the particular flatcar, and also that the truck was loose, that that particular truck was loose on the flatcar. That created the presumption of negligence, your Honor, in which I didn't have to go any further. I didn't have to bring in the particular statutes or the regulations from the company or from the Government which showed that that had to be done. The mere fact that it wasn't done, the mere fact that that condition did exist, protects the employee under the Federal Employer's Liability Act. A safe place to work has to be afforded to the employee, and this was [213] not a safe place to work.

Now if we are going to say that if anything happens along a trip, say just in this short distance, and there is no constructive notice to the company, where does the benefit of the act come to the employee? If a wire should break coming down there, how does that help the employee?

That act is the same nature as the state workmen's compensation act, which is to compensate a man for a situation such as this.

Now even if these wires broke and became untangled from the wheel coming down that pass, and he in the performance of his duty was walking along there and trips on the wire, that, your Honor, creates a presumption of negligence in which this employee is protected.

The Court: Under Section 54 of Title 45 he does not have any presumption of risk where the injury resulted in whole or in part from the negligence of any officer, agent, or employee of such character. So it need not have been entirely the responsibility of the railroad company, as I read that section, to have cared for the loading of the trucks or the wire, but if they were in part responsible for it.

So how are they in part responsible?

Mr. Karen: In part responsible because at the time these cars were loaded on there they should have been properly loaded. In other words, there has been testimony that in most cases—Mr. DeVaney testified himself in most cases—these [214] trucks are put on there with blocks, they are blocked in. In this particular case they were wired. At the time they put on those wires they should have put on wires of sufficient strength and in such a manner so that they couldn't come loose under any circumstances. They should have inspected them.

The Court: You mean they should not have accepted the transportation of these trucks with those wires if they were not strong enough?

Mr. Karen: That is right, according to proper tests that they would have to conduct or according to the manner in which they were tied on.

On the point whether recovery can be had to injuries under the Federal Employer's Liability Act, the case of *Anton Bella v. John Allison and sons, 1927*—this happens to be an English case, but I have another one—a workman traveling by train to his work was injured while trying to get off a moving train at his destination. It was held that getting off the train while in motion was not an act so contrary to law as to remove the workman from the sphere of his employment and therefore from compensation under the act.

The Court: That goes off on an entirely different theory of law and a different branch of law; whether or not a man is or isn't employed on his way to or from work.

Mr. Karen: Well, it covers the question of recovery under the act. [215]

However, we will forget about that and go along on the question of negligence.

I think in this particular case there has been a clear showing that a safe place to work was not afforded this workman; that the fact that the wires did become loose and were broken shows negligence in the manner in which that particular piece of equipment was put on that car, thereby creating that unsafe condition and resulting in his injuries.

The Court: If the railroad had the responsibility of not hauling the trucks unless they were safely attached, wasn't this plaintiff guilty of contributory negligence in his failure not to have observed when he inspected the train that these wires were not such as, we will say, could hold these trucks?

Mr. Karen: Contributory negligence is no bar to recovery, but it tends to diminish the amount recoverable.

All right. In this particular case Mr. DeVaney testified that he, together with Mr. Anderson—they worked together all the time—he always took the right side and Mr. Anderson always took the left side except in the particular place where they had to meet for orders.

So Mr. DeVaney testified on this particular run it was his duty or his custom to inspect the left side. He passed this truck on the left side of the flatcar because there was a fire ahead in the next car, or there were sparks coming [216] from the wheel, so seeing that from the car in back of it he went to the left naturally along the left side of these cars. That is the first time he had passed there. He had not inspected that because that was done by Mr. Anderson presumably. It was Mr. Anderson who went back there and flattened them down after he showed them where he had fallen from the car. Therefore there was no contributory negligence on his part in the performance of his duties. He had done everything up to that point normally expected of him. He had worked on that route for a long time, and he had done this type of work since 1926. He was an experienced man. Therefore I don't think any contributory negligence can be imputed to him at all in this particular case.

The Court: Mr. Davis, I understand your position to be that the railroad has no responsibility for the safe attachment of these trucks.

Mr. Davis: Oh, no, I wouldn't say that. I would say that if there were evidence at the point of origin when the trucks were accepted and these cars loaded, were accepted for shipment, it was found at that time that the wiring was defective, it would then be the duty of the railroad company to reject the shipment until it had been properly put on.

The Court: There is no presumption that flows from the fact that the wires were broken?

Mr. Davis: Absolutely not. [217]

The Court: That they were not in a defective condition?

Mr. Davis: How can that be, your Honor?

The Court: I am just asking you. They broke, didn't they?

Mr. Davis: Yes.

The Court: Why did they break?

Mr. Davis: My automobile breaks down sometimes. Is that any evidence that when I bought it it was in a defective condition? It depends a lot on what the circumstances were. Any wire will break under stress. We are not an insurer that nothing will happen to this thing while it is going along. We couldn't be held to such a responsibility, your Honor.

The Court: Suppose that the truck had been put on there by piano wire or string and the railroad had accepted it for hauling. Would you have had any responsibility for doing that if it broke?

Mr. Davis: I certainly think so.

The Court: You do?

Mr. Davis: Surely.

The Court: What would be necessary for this plaintiff to show, assuming that all the other factors were equal, before he could show that this was a defective piece of equipment?

Mr. Davis: I think he would have to show that it was an improper method of loading. He would have to have some ex- [218] quipment of this sort who would testify.

The Court: I *though* you said the responsibility for loading was on the shipper.

Mr. Davis: Well, it is. The Government did the loading, there is no question about that. They put it on there. It is up to us to carry it as they have loaded it unless, as reasonable men, on making an inspection there is reason to suppose that something will happen to it if it isn't corrected.

Now in this case, on the contrary it has been shown that they were loaded in the ordinary and usual manner, the customary manner in loading such equipment. There isn't anything shown to have been improper about it at all.

True, it is testified to also that on occasion these wires will break, and that if bands are used, bands will break due to stress and strain during the shipment, but there can't be any such thing as an insurance proposition. There can't be any requirement beyond reasonable care. The requirement that because wire broke, therefore necessarily or even inferentially in any manner it must have been secured improperly to start with, when we have testimony that it has been on the way a long time, has come through snow and all that sort of thing, it has been inspected regularly and was inspected at Yermo on this occasion by the car men, it was inspected on the way down, nothing was apparently wrong with [219] it until all of a sudden you find that it is broken. If there is any evidence of negligence in that state of affairs, I certainly can't see it.

I would like to read one sentence from a case, a Missouri case, affirmed by the Supreme Court:

"Under the Federal statute the presumption prevails even after proof of the defect that the railway

company was not aware of its existence and until it is shown that the railway company knew, or in the exercise of ordinary care should have known, of the defect it is not charged with that knowledge."

The Court: That is the same rule that applies to municipalities.

Mr. Davis: Well, I hadn't thought of that, but I suppose any occupier of premises would have the same rule. It is a common, ordinary rule of negligence. There isn't anything special about it.

The Court: I think I would like to examine some of the cases to see just what the responsibility of the railroad was, whether or not there is any responsibility at all beyond the point that you have asserted. If there isn't, I would have to give judgment for the defendant; if there is, I would give judgment for the plaintiff.

I think I would like to see what some of the authorities [220] have said in that respect. I do not go along with you on your broad statement about the rule of notice and negligence. That may be the rule so far as railroads are concerned. It is the rule as far as municipalities and public corporations are concerned.

Mr. Davis: I would like to be heard on the question of injury once more. I didn't finish what I had in mind.

In this case we have a preformed sac. We have a hernia which is—

The Court: It was preformed as of November 8th.

Mr. Davis: Well, we haven't any medical evidence on that.

The Court: That is what it says there, and the report was dated November 8th. That means that it was formed before November 8th.

Mr. Davis: Well, no, I don't so understand that.

The Court: That is the way I read the English language.

Mr. Davis: Well, I have talked to doctors and I don't think that is their interpretation, but we haven't any evidence on that. Anyway, that isn't what I have in mind particularly.

We have a hernia discovered on February 16th, according to all the evidence in the case other than Mr. Devaney—well, other than that given on the witness stand—but all the previous statements of everybody concerned, where he did- [221] n't notice anything until about two or three weeks later. All right. The date of February 16th is really the date when he discovered the hernia. At that time of course he sought to assign a cause for it. However, he also had the testicle injury which could not have occurred on January 21st. I know that because he would have noticed pain right then if he had injured his testicle at that time.

Anyway, as far as the hernia is concerned, he then at that date tries to assign a cause. As the doctors have said, any slight strain, a cough, lifting something, after a hernia has protruded to a certain point, will cause the protrusion. There isn't any more likelihood that it was caused by this accident than that it was caused by any number of other things.

How, then, can the Court decide that the hernia was caused by that fall? I think it would certainly be errone-

ous to do so, when you have equally valid reasons for which you can assign a certain condition. Then to pick out one of them—well, courts haven't allowed juries to do that.

The Court: If you wish to submit briefs, all right. If not, I will take the matter under submission. I want to examine some of the authorities on this question of the liability of the railroad.

Mr. Karen: I don't particularly care to submit briefs, your Honor.

The Court: I think the evidence preponderates in favor [222] of the injury as of that time. The only thing that is contrary to it is his prior inconsistent statements. To say that he got it from some other cause would be to say that there isn't any evidence of any other cause, and I have to assign it on that, we certainly do not instruct juries to do that either.

I will take the matter under submission. Do you want to file briefs?

Mr. Davis: I would like to; yes, your Honor. I am thoroughly convinced that your Honor is about to commit error and I would like to do my part in preventing it.

The Court: Well, if you will limit the briefs solely to the proposition of the degree of care which the railroad must exercise, that is the only point I am interested in, because if I gave a judgment here I wouldn't know how much money to give it for. I certainly do not think the defendant would be entitled to his July vacation pay.

Mr. Karen: That would only be one week.

The Defendant: I didn't show that. I didn't count that.

Mr. Karen: He says it is not included in the 177 days, your Honor.

The Court: Well, whatever it is. So if you will file briefs on the question of the degree of care, I will take the matter under submission when the briefs are received.

How long will you want to file them in? [223]

Mr. Davis: I would like 10 days.

The Court: Briefs filed simultaneously.

Mr. Davis: And then 5 days for each of us to answer the other one?

The Court: If you want that, yes.

Mr. Davis: I don't know whether I will want it or not.

Mr. Karen: If he wants to make a project out of this, all right.

The Court: I have found that lawyers say everything they are going to say in their first brief, and then if they have 5 days to reply they just say it over again in response to the other one. But if you wish 5 days to reply, you may have it.

Mr. Karen: I don't particularly care.

The Court: All right. All briefs will be in within 10 days. Otherwise the matter stands submitted.

(Whereupon, at 11:35 o'clock a. m., the trial was concluded.) [224]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 12th day of May, A. D. 1946.

AGNAR WAHLBERG

Official Reporter

[Endorsed]: Filed Jun. 21, 1946. [225]

[Endorsed]: 11426. United States Circuit Court of Appeals for the Ninth Circuit. Union Pacific Railroad Company, a Corporation, Appellant, vs. Martin R. DeVaney, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed September 12, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

UNION PACIFIC RAILROAD,

Appellant,

vs.

MARTIN R. DeVANEY,

Appellee.

STATEMENT OF POINTS AND DESIGNATION

Statement of Points on Which Appellant Intends to Rely
on Appeal

1. The evidence is insufficient to support the Findings of Fact.

2. The doctrine of *res ipsa loquitur* does not apply in this case.

3. There was no evidence of any negligence on the part of the defendant which proximately contributed to the happening of the alleged accident.

4. There was no evidence of proximate causal connection between the alleged accident and the injury complained of.

Appellant designates for printing the entire certified transcript.

Dated at Los Angeles, California, September 18, 1946.

E. E. BENNETT
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[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 20, 1946. Paul P. O'Brien,
Clerk.

No. 11426

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY a
corporation,

Appellant,

vs.

MARTIN R. DeVANEY,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED
DEC 13 1946

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No. 11426

IN THE

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FOR THE NINTH CIRCUIT

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APPELLANT'S OPENING BRIEF.

Statement.

The above action was brought by the plaintiff, a brakeman in the employ of the Union Pacific Railroad Company, for injuries alleged to have been sustained January 21, 1944, at El Cajon Station, San Bernardino County, California, when he tripped over some wires on a flat car contained in a freight train. Plaintiff charged that the defendant so negligently fastened a tractor to the floor of the flat car with wires that they became entangled in plaintiff's clothing. Plaintiff claimed that he sustained a hernia as the result of such negligence.

The case was tried May 7, 1946, before Judge Pierson M. Hall sitting without a jury. Judgment against defendant was entered in a total sum of \$2,883.66, and defendant prosecutes its appeal therefrom.

The evidence in general was to the effect that plaintiff was the swing brakeman on a freight train which started, from Yermo, California, about 2:00 P.M. January 21, 1945. His duties as swing brakeman were to inspect the train at all opportunities and particularly the rear portion thereof. The flat car in question was about two-thirds of the way back in the train and was therefore in the portion of the train for which plaintiff was responsible. His duties on inspection included the duty to find and remedy defects such as the broken wire in question. The train had been thoroughly inspected by carmen at Yermo and was again inspected several times on the way without any defect being discovered. However, as the train was coming to a stop at El Cajon, the plaintiff went up alongside the tractors on the flat car, caught his trouser-leg in a broken wire, and fell off the car. At the trial he testified somewhat vaguely that he noticed an injury in the neighborhood of the abdomen that same night and noticed some swelling. However, several statements from the plaintiff himself—some in his own handwriting—and statements of other members of the crew were to the effect that plaintiff noticed no injury in that region for two or three weeks afterward. Plaintiff was, however, on February 16, 1945, discovered to

be suffering from a left inguinal hernia and was subsequently operated on by the Union Pacific doctors free of charge to plaintiff, as provided for by the Regulations of the Hospital Department to which plaintiff made contributions.

Although plaintiff in his complaint made a specific charge that the defendant was negligent in that it fastened a tractor to the floor of the flat car, he made no effort to prove that charge at the time of trial. Inferentially, it appeared that the defendant did not have anything to do with fastening the tractor in question to the flat car, but that this was done by the government, since the tractor in question had come from an army base at Utah, and was an army tractor. There being absolutely no evidence of negligence on the part of the defendant, the court relied on the doctrine of *res ipsa loquitur*. Defendant and appellant does not believe that doctrine was applicable under the circumstances shown by the evidence. In fact, even if the doctrine were applicable, it is believed that the testimony affirmatively proved that the defendant actually used due care, and that there was no contradictory evidence. Furthermore, it is believed that the evidence was utterly insufficient to support any inference that if plaintiff fell from the flat car as he alleged, such fall was the proximate cause of the left inguinal hernia.

Argument.

I.

The Evidence Was Utterly Insufficient to Support the Findings of Fact.

The findings of fact made by the trial judge were that the allegations of paragraphs I, II, III, IV, V and VI of the plaintiff's complaint were true. We have no quarrel with those findings so far as they apply to the first four paragraphs.

As to paragraphs V and VI, However, there was absolutely no evidence to support any finding that the allegations of those paragraphs were true. In paragraph V it is charged that the defendant fastened the tractor to the flat car with wires so negligently that they became entangled in plaintiff's clothing. There was not a scintilla of evidence to support any conclusion that the defendant had anything to do with fastening the tractor to the flat car or made use of any wires for that purpose. On the contrary, the evidence was that the tractors on the flat car were army tractors [R., 25]; that the point of origin was some big base in Utah [R., 203]. It is common knowledge that in the case of carload shipments, the carrier furnishes empty cars which are loaded by the shipper.

“As a general rule, the carrier loads all inanimate or ordinary freight tendered in less than carload lots, while the consignor loads in all cases where, for his convenience, the car is placed at his warehouse or on public team tracks. This practice has grown up not only because the work can be more satisfactorily performed by the owner. but also because it is impossible for railroad com-

panies economically to load cars at private warehouses, or on those tracks where vehicles of the consignor or consignee come and go at discretion of the owner." 9 Am. Jur. 701.

If any inference at all is to be drawn as to who fastened the tractors to the flat car, the only permissible inference is that the government did so. Any finding that the defendant performed that act was not only unsupported by any affirmative evidence, but is contrary to the only possible inferences from such evidence as there was.

With respect to paragraph VI, note that the charge is that defendant violated the Federal Safety Appliance Laws in fastening the tractor to the flat car. The Safety Appliance Laws referred to are contained in Title 45, U. S. C. A., Sections 1 to 46, inclusive. By no conceivable construction can such laws be applied to the manner in which a load is secured to a flat car. In any event, as set forth above, there was no evidence that the defendant had anything to do with fastening the tractor to the flat car.

The second portion of paragraph VI is the only allegation in the complaint which makes a charge which could conceivably be supported by any evidence in the case. The charge there is "* * * and that by reason of the defendant's failure to provide a reasonably safe and proper place for the plaintiff to work, the plaintiff was caused to and did fall from said train * * *". However, as shown, there was no evidence that the defendant had anything to do with the use of the wires in question,

and the only inference was that government employees had used them. Therefore, there was no evidence of failure on the part of the defendant with respect to failure to provide a safe place to work. The evidence at the trial was that the train was thoroughly inspected at Yermo before it started, and that a defect such as broken wires would have undoubtedly been remedied at that time if it had existed at that time. Also, additional inspections by the plaintiff of that portion of the train disclosed no defect prior to the time when the train was pulling into Cajon. At that time plaintiff testifies that he tripped over the broken wire and fell from the train. Therefore, if defendant had a duty with respect to the wires, it was shown that it had made thorough and repeated inspections which disclosed nothing to be wrong with the wires until after plaintiff had taken over control of that portion of the train and after it was his own duty to keep the place of work safe. There was absolutely no evidence from which it could be inferred that the defendant or any employee of the defendant, other than the plaintiff, was guilty of any negligence with respect to providing plaintiff with a safe place to work.

It is submitted that there was absolutely no evidence upon which to base a finding that the allegations of paragraphs V and VI of the complaint were true. As shown above, the court resorted to the doctrine of *res ipsa loquitur*, but it did not refer to that doctrine in the findings and for that reason the judgment was not supported by findings which had any support in the evidence.

II.

**The Doctrine of Res Ipsa Loquitur Does Not Apply
in This Case.**

The evidence was that the train had been thoroughly inspected by car inspectors at Yermo, which was the starting point of this train [R., 178]. The car in question was fourth or fifth ahead of the caboose [R., 29] or about two-thirds back from the engine [R., 87]. It was plaintiff's duty as swing brakeman to inspect the train at every stop for the condition of the running gear and the general safety of the train—to see that everything was in order [R., 24]. He made such an inspection at every opportunity on that trip [R., 88]. While he was vague about the exact places, it is apparent there was an inspection made at least at Barstow and Victorville [R., 90], either by himself or by the conductor, or both. If the wire had been broken at that time, it would have been fixed [R., 91]. While plaintiff tried to make it appear that he himself didn't inspect the left side of the train, it was clearly his duty to do so [R., 24, 150, 179]. The wire used for fastening the trucks was heavy, and fastening by such wire was one of the two customary methods [R., 154-156]. Plaintiff's counsel, seeing that the evidence was clear that the wire was not broken at the time inspection was made at Victorville attempted to show that it might have become broken as the train descended the grade to the point of accident [R., 188, 203, 204]. It is probable that that is exactly what happened. The least that can be said is that frequent inspections revealed no defect prior to that time.

This was the evidence from which the trial judge found that the defendant was guilty of negligence and that such negligence proximately caused plaintiff's hernia.

It should be remembered that the trucks were army trucks and there being no evidence on the subject, it must be assumed that the trucks were loaded on the flat cars by the United States Government in accordance with the usual custom. There can then be no inference of negligence with respect to receiving the loaded flat car from the government. The trucks were secured in an apparently substantial manner and in the usual and customary way. It is the legal obligation of the carrier to accept for transportation goods so delivered to it.

“A carrier may not, however, arbitrarily determine that goods packed in a particular manner are not in proper shipping condition, and then refuse to accept them on that ground; the requirement of proper packing means such packing as experience has proved to be necessary to insure the goods being carried with a reasonable prospect of safety”. 9 Am. Juris. 614.

There was no evidence in this case that the tractors were not secured in such a manner, and as shown, the evidence was, on the contrary, that the tractors were loaded in a secure and customary manner. It being the legal duty of the carrier to accept the tractors so packed for transportation, it surely can not be held negligent for doing so.

The evidence as to inspections en route is uncontradicted and can give rise to no inference of negligence. The testimony indicates that the wire was intact at Victorville, the last stop before the accident. There is

absolutely no evidence that it was not intact there, nor any evidence of actual or constructive notice to the defendant of the existence of any defect prior to the moment of accident. However, such notice as well as a reasonable opportunity to remedy the defect is absolutely essential to the imposition of liability.

“Knowledge, then, or opportunity by the exercise of reasonable diligence to acquire knowledge, of the peril which subsequently resulted in injury to the employee is fundamental to responsibility on the part of the employer.” 35 Am. Jur. 556.

McGivern v. M. P. Ry. Co., 132 F. (2d) 213.

In that case an engine foreman who was riding the leading footboard of an engine apparently slipped off the footboard due to an accumulation of ice and snow, fell under the engine and was killed. The evidence showed that snow had been falling throughout the time after the crew reported for work and the time of the accident. The footboard had been cleaned once, but ice and snow accumulated on it again. There were suitable tools on the engine which could have been used to clean the footboard if the foreman had desired to do so. After a jury verdict for the plaintiff the trial court granted the defendant's motion for a judgment notwithstanding the verdict. The Circuit Court of Appeals affirmed the judgment. The opinion brings out the point that while an employer has a duty to furnish a safe place to work, he is not an insurer in that respect. Since the decedent himself was on the scene and was intimately acquainted with the condition of the footboard, and since the employer had provided tools with which he could have rectified the condition

if he had desired to do so, there was no negligence on the part of the employer, and the only negligence involved, if any, was that of the decedent himself. The decision is of interest by reason of its discussion of the general principles involved in a case similar to that at bar, and is also interesting because the engine foreman in the *McGivern* case occupied a similar position to that of the plaintiff in the case at bar with respect to being in charge of the portion of the employer's instrumentalities involved in the accident. The court will recall testimony that DeVaney's principal duties were to inspect the rear half of the train at all proper opportunities and to remedy any defects found. The employer therefore, having fully inspected the train at Yermo and found that there were no defects at that time, placed DeVaney in charge through the remainder of the trip. The probability is from the evidence that the wire broke as the train was coming down Cajon Pass and after the last inspection point. In any event, we know that the wire was not broken when the train left Yermo and that it broke some time during the journey, during which Mr. DeVaney's principal duty was to inspect the portion of the train in which the flat car was and to remedy any defects found. He was therefore in the same position as the engine foreman in the *McGivern* case. In that connection it might be pointed out that the law of California is similar in this respect.

In *Duffy v. Hobbs, Wall & Co.*, 166 Cal. 210, a foreman in charge of one portion of a saw mill was killed when a decayed post holding a railing gave way and precipitated him into the water below. The court held that since the deceased was in charge of that portion

of the saw mill, and since it was his own duty to inspect for and repair defects of that nature, the employer can not be charged for the results of the decedent's failure to keep that portion of the premises safe.

A case quite close on its facts to the case at bar is *Patton v. Tex. & Pac. R. Co.*, 179 U. S. 658; 45 L. Ed. 361. This case was brought under the Federal Employers' Liability Act. The evidence was that when the fireman stepped on a step in order to get off the engine as it was pulling into its own depot, the step turned under him due to a loose nut, thereby throwing him under the engine and causing injuries resulting in the amputation of his foot. The evidence was that the step had been inspected at the last previous inspection point, and had then been found secure. There was some evidence that the step had been removed at that last inspection point and reapplied. Plaintiff's argument was that the fact that the nut was loose shortly after such application indicated negligence in the manner of attaching the step. Numerous causes, however, were given for the loosening of the nut, such as the usual motion of the engine, the step striking some object, the throwing of lumps of coal onto the step when the engine was coaled. At the end of the evidence the trial court directed a verdict for the defendant. This was affirmed. The burden was on the plaintiff to prove actual negligence. Mere proof of the existence of the defective step was insufficient. In the same way, mere proof that the wires actually broke is no proof of negligence. There is no evidence that the wires were unsuitable, nor is there any evidence of negligence of any sort in causing the breaking of the wire.

In an attempt to escape the necessity of fulfilling the burden of proving that the wire broke due to negligence on defendant's part, and also to prove that the defendant had actual or constructive knowledge thereof in time to remedy the defect, both plaintiff's counsel and the trial court resorted to the doctrine of *res ipsa loquitur*. As a matter of fact, there was no negligence on the part of defendant, and the evidence proved it. Reference to the doctrine was, therefore, the last resort in an attempt to fasten liability on the defendant. However, even if the doctrine were applicable in this case, it is believed that the plaintiff's proof was insufficient. It is well established that the effect of applying the doctrine is merely to shift the burden of going forward with evidence. After all the evidence is in, the burden still remains with the plaintiff to prove negligence and proximate cause by a preponderance of all the evidence. In this case plaintiff's evidence as to negligence began and ended with the showing that plaintiff fell due to a broken wire. If it could properly be said that the mere showing that the wire broke cast upon defendant the burden of going forward with evidence that the break was not due to its negligence, it is submitted that such burden was fully met and that the effect of all the evidence was to leave no room for any inference of negligence on defendant's part. It was proved that the tractors were army material from a base in Utah; that they were secured to the flat car by blocks and heavy wire [R., 154]; that that was the usual method [R., 155, 156]; that the train was thoroughly inspected at Yermo [R., 178]; that it was again inspected during the trip and a broken wire was the sort of thing being looked for

[R., 179]; that the brakemen charged with the duty of inspection were furnished with adequate electric lanterns [R., 180]. The uncontradicted evidence was, therefore, that defendant exercised due care in accepting the shipment and in caring for it en route. In spite of that care, it appears that the wire broke after the last inspection point, but the evidence precludes any inference that the breaking was due to negligence on the part of defendant. Therefore, even if the doctrine were applicable initially, the effect of the uncontradicted evidence was to dispel all inferences based on the doctrine.

But we believe that the doctrine was not applicable under the circumstances existing in the case at bar. Two reasons have usually been assigned for invoking doctrine: first, that the instrumentality causing the accident is so much within the control of the defendant that evidence as to what actually happened is available to the defendant but not to the plaintiff, and it is therefore advisable to adopt a rule which will place pressure on the defendant to disclose the evidence as to what actually happened. Another reason assigned for invoking the doctrine is that evidence as to what actually happened is under the circumstances not easily available to the plaintiff and the circumstances surrounding the accident are such that it seems probable that the cause of the accident is negligence on the part of the defendant. Neither of these reasons exists in the case at bar. The portion of the train containing the flat car in question was wholly within the control of the plaintiff himself. As swing brakeman it was his duty to inspect that portion

of the train for defects of this sort at every possible opportunity and to remedy such defects, if found. Evidence, therefore, as to the actual cause of the wire's breaking was much more available to the plaintiff than it was to the defendant. Also, the fundamental requirement that defendant be in control of the instrumentality in question was non-existent. As to the second reason for invoking the doctrine, there was absolutely no reason to suppose that the wire broke because of any negligence on the part of the defendant. It was not claimed by the plaintiff that there was any negligence in the operation of the train or in any other respect which could cause the wire to break.

The case cited by the trial judge as authority supporting the judgment against defendant is *Pitcairn v. Perry*, 122 F. (2d) 881 (C. C. A., 8th, 1941). Perry a car inspector was injured when a car door fell on him, due to its being in poor repair. It appeared that Perry was one of the crew of car inspectors assigned to inspect a freight train while it stopped temporarily at Moberly, Missouri. The door of a box-car was found to be open, so Perry and three others tried to close it by hand. This failing, one of the men went for a crow-bar, and the four tried again with this aid, Perry wielding the bar. On this attempt the door left its fastenings at the top, and fell on Perry. The court held that *res ipsa loquitur* applied, and that the inference of negligence so supplied was sufficient to support a jury's verdict for Perry.

Even a cursory examination of the opinion shows that the two cases are entirely dissimilar so far as the application of *res ipsa loquitur* is concerned.

1. In the *Perry* case the evidence was that a door in proper repair could not be caused to leave its fastenings when handled as it was at the time of the accident.

“The evidence showed that prying up the door as plaintiff did should not cause it to leave the track; that unless the metal parts of the door were so worn and corroded, or unless the wood was so rotten and defective that it would permit a slack of approximately an inch and a quarter, the accident could not have happened. Unless the door had been defective, prying upwards upon it as was done would not make it come off but would cause it to stay in at the top.”

Therefore, there was a strong inference that there was a defect in the car, due to defendant's negligence in failing to keep it in repair. In the case at bar there is no evidence of any defect in any car or other instrumentality under the control of defendant.

2. In the *Perry* case the defect was not readily apparent by outward inspection of the sort which could be given en route. Even by working on the door in the attempt to close it, the defect was not discovered.

In the case at bar, frequent inspection showed no defect. But when the wire broke, the dangling ends became a defect, and one that was clearly apparent.

3. In the *Perry* case it was argued that control of the car door was not in defendant, but was in Perry. But as the court said:

“The duty and responsibility of inspection of the top of the door was not plaintiff's. His op-

portunity to observe a defect at night, the car in question being about eleven feet in height, was too limited in time and in physical possibility to make it reasonable to say that he was in control or that he had the means of knowledge of the dangerous condition existing, or its cause. Mere proximity to this car would not imply control over it nor would it detract from the control which the defendants at all times had over the instrumentality. At the time of the accident, plaintiff was only one of four employees attempting to close this door on a car then a part of a moving train which was stopped but temporarily in its movement.”

In our case, it was plaintiff’s specific duty, as swing brakeman, to care for the rear half of the train, to inspect it at all opportunities for defects such as broken wires, and to remedy them. Therefore, the “control” of defendant over that portion of the train had been delegated to plaintiff himself. The language above quoted from the *Perry* case indicates that if the facts had been like those in the case at bar, the decision would have been just the opposite. As set forth in the *Perry* case, it is essential to *res ipsa loquitur* that it be shown first that the thing which produced the injury was under the exclusive control and management of defendant—if it wasn’t, but was rather under the control and management of the plaintiff, the doctrine is inapplicable.

See *Dryden v. Western Pacific R. R. Co.*, 1 Cal. App. (2d) 49, 54, in which the court said:

“The doctrine of *res ipsa loquitur* cannot therefore be held applicable to the deceased. Such a rule can only be held applicable when the control of the instrumentality is in the employer or its servants, other than the injured person, for the doctrine itself is predicated on the principle that those in control have in some way been negligent.”

4. In the *Perry* case it was shown that if the car door were in proper repair, it would not have fallen, *i. e.*, the fact that it fell indicated that proper care had not been used.

In the case at bar, the evidence was that similiar wires, similarly used, had broken on previous occasions [R., 156] without any intimation that such previous breaking was due to negligence. There was no showing that if due care were used, the wire would not have broken. Yet that is one of the essential fundamentals to applying the doctrine. It must appear that the happening in question is such that it ordinarily would not have occurred without negligence. It should also be remembered that the carrier was obliged to accept the tractors for transportation as prepared by the shipper, unless there was very evident insufficiency in such preparation. If such preparation were inferred to be negligent from the bare fact that the wire broke, such negligence might conceivably be referred to the shipper,

but surely not to the carrier in the absence of any evidence of any sort that the carrier was negligent in accepting the shipment.

For the above reasons we believe that under general legal principles the doctrine of *res ipsa loquitur* was not applicable in this case, and that the *Perry* case is no authority to the contrary.

III.

There Was No Evidence of Any Negligence on the Part of the Defendant Which Proximately Contributed to the Happening of the Alleged Accident.

Perhaps this point has been sufficiently covered above. It will be no doubt conceded that without the assistance of the doctrine of *res ipsa loquitur*, there was not a scintilla of evidence that defendant was negligent. There was no evidence that defendant actually secured the tractor to the flat car, or had anything to do with applying the wire which broke. There was no evidence that it was negligent to accept for transportation a tractor secured as this one was. There was no evidence that the use of this kind of wire was negligent. The uncontradicted evidence was that thorough and frequent inspections were made. There was no evidence that the wire was broken at such a time as to give defendant actual or constructive notice of the break, or an opportunity to remedy the situation. The result was a complete failure of proof to entitle plaintiff to a judgment.

IV.

There Was No Evidence of Proximate Causal Connection Between the Alleged Accident and the Injury Complained of.

At the trial plaintiff and his wife gave very unconvincing testimony to the effect that a "swelling" was found in plaintiff's abdomen the morning after the accident. However, the swelling referred to was that which would normally follow a blow to any tissues of the body, not to the protrusion caused by a hernia [R., 126]. On questioning by the court, Mrs. DeVaney's final testimony was that she knew "his stomach was red and swollen" [R., 131]. There was no evidence of an actual protrusion of the hernia until the examination by Dr. Ballachey on Feb. 16, 1944 [R., 109]. There was vague evidence by plaintiff that Dr. Ballachey found a hernia before February 16th, but that was categorically denied by the doctor. If plaintiff had made any claim that a hernia was caused by injury, it was the doctor's duty to make out an accident report immediately, and no such report was made [R., 113].

The reliable evidence on this subject is contained in the accident and other reports by plaintiff and the other members of the crew.

The earliest report is plaintiff's, on "Form 2611", dated March 4, 1944. In it he said, "No injurie noticed until about three weeks after accident". [R., 80]—Also: "After about three weeks my left side of my abdomen began to swell." [R., 81].

Being so notified that DeVaney claimed a hernia caused by accident on duty, claim agent Ford took a more de-

tailed report on April 22, 1944. In that statement, he said:

“When I fell I did not notice any pain in the region of my groin to indicate I had received a hernia at the time. I had lost my breath and was a little shakey at the moment, thinking I was lucky I didn’t go under, and I did not notice any pain in this area afterward until about two or three weeks later I noticed, after cohabitation with my wife, I noticed quite a severe pain and my left testicle swelled up to about the size of an orange. That is the first time I noticed any pain in this region.” [R., 85].

In applying for accident insurance benefits, plaintiff stated he first went to a doctor in “early February”. [R., 94].

When he entered the hospital, an interne took a history, which read in part, “About nine months ago (February, 1944) the patient noticed swelling of the left testicle and a few days later swelling in the left lower abdomen.”

Can we believe plaintiff’s testimony that he went to Dr. Ballachey on Jan. 22, in the face of those prior inconsistent statements? Such impeachment could be ignored only from a conscious or subconscious desire to do so.

And we find additional corroboration in the accident reports of the other members of the crew. Such reports were not made at the time of the alleged accident, as absolutely required in case of injury, for the reason that plaintiff denied being injured. Later, after the hernia had developed, plaintiff assigned the occurrence

of Jan. 21st as the cause, made his report of March 4th, and then the other crew members were called upon for their versions.

Plaintiff's witness, Kenneth Anderson, the rear brakeman, reported, "Brakeman DeVaney mentioned to me at the time of accident that he had fallen off Flat Car while we were pulling into Cajon passing track, but did not mention anything about being injured at this time." [R., 147].

Plaintiff's witness, Robert Hopkins, head brakeman, reported, "He did not state that he was hurt much at that time but a few weeks later he complained about his side hurting." [R., 159].

Defendant's witness, Russell G. Brown, conductor, reported, "Brakeman DeVaney notified approx. 1 mo. later of these facts. Said he did not mention it at the time it happened because he did not think he was hurt." [R., 199].

The truth of the matter very evidently is that DeVaney first had pain in the left testicle about three weeks after January 21, 1944, and thereafter had a swelling in the left inguinal region—as he told Mr. Ford, and the interne at the hospital. How then can it be said that plaintiff proved that the fall off of he flat car caused his trouble?

As testified, every man has a potential hernia [R., 118] and an actual protrusion of viscera through the inguinal ring may be caused by any sort of activity [R., 120]. Both doctors testified that if the fall had caused such a protrusion, there would be immediate pain and immediate swelling [R., 113, 114, 119].

As counsel understands the subject, a predisposition to hernia exists in all males, because of the formation of a sac when the testicles descend from the abdomen to the scrotum in early childhood. Then, repeated intra-abdominal pressure, such as caused by heavy lifting, coughing, or straining at stool, has a tendency to force *viscera* into the sac. Repeated incidents tend to force the sac farther and farther down the inguinal canal, and a final incident may force sac and contained *viscera* through the inguinal ring. This final incident almost invariably is accompanied by intense pain and an immediately noticeable protrusion and swelling in the inguinal region. In the case at bar the reliable evidence is that plaintiff noticed such pain and thereafter such swelling about three weeks after the fall of January 21st. Both doctors testified that if a protrusion had occurred on January 21st, plaintiff would have had at that time immediate pain and immediate swelling. All the reliable evidence is that he did not notice any such pain or any such swelling. It should be borne in mind that the type of pressure required to cause the protrusion of hernia is intra-abdominal pressure. A fall such as that described by plaintiff would not cause such pressure. There would be a blow to the external walls of the abdomen, but not the type of blow which would cause the exertion of pressure from inside the abdomen. That sort of pressure can only be caused by flexion of the abdominal muscles. We see, then, that it was extremely unlikely that the fall had anything to do with the final protrusion of the hernia. On the other hand, such protrusion could be caused by coughing, straining at stool, lifting, or even by vigorous sexual intercourse. It is

significant that the plaintiff told Mr. Ford that he first noticed the pain and swelling immediately after having intercourse with his wife. If we are to look for probabilities, certainly the most probable cause of the final protrusion of the sac through the inguinal ring was this incident of sexual intercourse. The very least that can be said about this state of the evidence is that it was not proven that the fall of January 21, 1944, was any more probable a cause for the protrusion of the hernia than a great number of other probable causes.

It is submitted that the choice of the fall as the proximate cause of the protrusion of the hernia was most unfair to the defendant and was a miscarriage of justice.

Conclusion.

While the amount in money of this particular judgment is not large, nevertheless the question is an extremely serious one. If employees of common carriers by railroad under the provisions of the Federal Employers' Liability Act are going to be able to collect damages from their employers whenever they develop hernias, on such flimsy evidence of negligence on the part of the employer and such remote evidence of connection between such negligence and the causing of the hernia, then a very serious precedent with far-reaching consequences will have been established. Such occurrences in the past have been satisfactorily taken care of by free operative treatment, and where a definite connection exists between some incident occurring in the employment and the protrusion of the hernia, an allowance on account of wages actually lost while the hernia was

being repaired has been made. In this case the trial court has not only allowed a sum for pain and suffering, but has also allowed wages claimed to have been lost by plaintiff during a period of nearly a year, and this in spite of evidence that during 1944 the wages actually earned by the plaintiff were greater than those earned by him during the year 1943 [R., 136]. The defendant feels that there has been a gross miscarriage of justice in this case and that the judgment should be reversed with instructions to enter judgment in favor of the defendant.

Respectfully submitted,

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No. 11426.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a corporation,
Appellant,

vs.

MARTIN R. DEVANEY,
Appellee.

APPELLEE'S BRIEF.

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FILED

JAN 31 1947

PAUL P. O'BRIEN,
CLERK

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No. 11426.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a corporation,

Appellant,

vs.

MARTIN R. DEVANEY,

Appellee.

APPELLEE'S BRIEF.

Statement of Pleadings and Facts Disclosing Basis for Jurisdiction of United States District Court and United States Circuit Court of Appeals.

This action was brought under the Federal Employers Liability Act. The District Court had jurisdiction of this case under the provisions of U. S. C. A. Title 45, Sections 51 to 60, it being an action for damages brought by an employee of a common carrier by railroad, engaged in interstate commerce, for injuries alleged to have been sustained while the employee was engaged in interstate commerce business of the employer, as a result of alleged negligence on the part of the employer [R. 2, R. 3, R. 4].

The Circuit Court of Appeals has jurisdiction of this appeal as provided by U. S. C. A. Title 45, Section 225(a), because the decision appealed from was a final one [R. 11], and no direct review thereof may be had in the Supreme Court under the provisions of the U. S. C. A. Title 28, Section 345.

Statement.

This is an action for damages for injuries suffered in an accident at 10:30 P. M. on January 21, 1944 [R. 24, R. 25], at which time plaintiff was employed by defendant as an assistant brakeman on a freight train operating between Yermo, California and San Bernardino, California, at a point commonly known as El Cajon Station [R. 24]. The injuries resulted from defendant's negligence in failing to fasten and secure a heavy ponderous tractor to the floor of the flat car in the freight train. The wires used were frayed, worn, weather beaten, dark and coated so as to make them invisible [R. 203]. As a result of the negligent, improper and careless securing of the heavy army tractor to the flat car, said wires broke and the plaintiff, performing his duties in, about and on said flat car, became entangled in the wires, and due to a sudden movement of the unsecured tractor on the flat car he was thrown from the moving train to the ground [R. 25]. As a result of the negligence on the part of the defendant, and the fall, the plaintiff sustained a hernia [R. 34, R. 36].

At the time of said accident plaintiff was earning and receiving as such assistant brakeman a wage of eight dollars and 24/100 (\$8.24 for each one hundred (100) miles. He averaged one hundred and sixty-four (164) miles per day [R. 8, R. 54]. As a further result of this accident the plaintiff lost one hundred seventy-seven (177) days work [R. 8, R. 53]. The plaintiff, therefore, sustained damages in the sum of two thousand three hun-

dred eighty-three dollars and 66/100 (\$2,383.66) in the form of loss of earnings [R. 8].

Judge Pierson M. Hall, sitting without a jury, heard this case on May 7, 1946, and found the defendant was guilty of negligence, and said negligence was the proximate cause of the injury, and entered judgment in the sum of two thousand eight hundred eighty-three dollars and 66/100 (\$2,883.66), from which judgment the defendant has appealed.

The plaintiff has been a railroad worker since September 27, 1926, and a brakeman for the defendant company since October 26, 1942 [R. 22]. The plaintiff was in perfect physical condition at and prior to the accident. He was given a physical examination by the defendant company before being by the defendant so employed [R. 23]. Plaintiff's duties as such assistant brakeman were to observe the running condition of the train and to follow the instructions of the conductor on the placing and picking up of cars at certain stations [R. 24]. It was the duty of the plaintiff to examine the train from end to end at every stop [R. 24], but there was neither special nor particular duty to especially examine the rear portion of the train, contrary to appellant's assertion. There is no evidence that the train had been inspected by car men at Yermo, California, nor that it was inspected enroute. The defendant's witness, Russell G. Brown, conductor of the train, did not remember whether any inspections had been made at Yermo or at any point on the trip on the day of the accident [R. 186]. The particular terrain

covered on this freight run is very mountainous and en-route to San Bernardino, California, it passes the El Cajon station [R. 24, R. 25]. The plaintiff was riding on the train and just before its arrival at El Cajon station observed "fire flying" [R. 25] from about the second or third car ahead. In order to get to the fire he climbed down from the box car he was on and on to the flat car immediately ahead which contained two army tractors, and walked along the left side of these tractors. The train lurched and at that moment one of the tractors shifted against the plaintiff. His feet became entangled on some broken wires on the floor of the car and as a result thereof he was thrown off the car [R. 25], falling flat on his abdomen on some pieces of wood, lumber and other debris that lay on the ground. The plaintiff suffered an immediate injury to his left abdomen, a cut lip, a broken tooth, and a cut on his knee [R. 27]. Mr. Kenneth Anderson, another brakeman on the same train, saw the plaintiff on the ground on his hands and knees trying to get up and at that time the plaintiff complained of his stomach hurting [R. 138]. Upon arrival home the following morning the plaintiff complained that his stomach hurt [R. 125]. His wife observed his cut lip and his knee and that a tooth was broken off. She further noticed that his left abdomen was swollen and red and she applied medication to it [R. 126]. The plaintiff sought the services of the Union Pacific doctor, Dr. J. L. Nevin, in San Bernardino that same morning but was unable to do so because the doctor was not available [R. 31, R. 127].

The plaintiff sought the services of Dr. J. E. Bal-lachey, the Union Pacific Railroad Company doctor at Yermo, California, on the day following the accident. Plaintiff's Exhibit Number 3 [R. 45] is a book in which the plaintiff kept a daily record of his hours of work and what occurred on each day. In that record book [R. 169] there is a notation after the date of January 22, which says, "Reported to doctor, Yermo."

The defendant has acknowledged the plaintiff's immediate report of the accident and the injury by a letter, Plaintiff's Exhibit Number 4 [R. 60] from the assistant superintendent of the defendant dated February 13, 1946, in which letter the defendant advised the plaintiff that the accident report submitted by him on January 23, 1944, had been sent to other departments of the company and was not available; Plaintiff's Exhibit Number 4, the defendant's letter, was in reply to Plaintiff's Exhibit Number 5 [R. 170, R. 171], a letter dated February 8, 1946, addressed to the defendant, requesting a copy of the accident report made on January 23, 1944. The record is replete with evidence that the plaintiff did suffer an immediate injury, contrary to the appellant's assertion that the evidence as to the time and nature of the injury is vague.

Referring to the signed statements by plaintiff and other members of the crew concerning the accident, the plaintiff testified that the various reports introduced by the defendant were made in writing by company claim agents who did all the writing and framed the answers in their

own words. He was told to sign these reports and was told that there was nothing for him to worry about, that everything would be taken care of [R. 63], although at the time, the swelling was getting worse [R. 73, R. 74]; further, the plaintiff was afraid the defendant would pull him out of service and this would work to the detriment of the large family that he had to feed [R. 99]. This technique of taking accident reports by the defendant company's claim agents was universal practice [R. 99, R. 100]. Robert Hopkins, head brakeman of the train, said the plaintiff did fall and that he did sustain an injury on the 21st day of January, 1944, and also, that the plaintiff did go see Dr. Ballachey on January 22, 1944 [R. 153].

Russell G. Brown, conductor, the defendant's witness, said that it was possible that the plaintiff had only inspected the right side of the train and that the head brakeman inspected the left side of the train [R. 187]. The accident occurred on the left side of the flat car.

Deductions are made from the employee's wages to provide for any medical attention that said employees might require [R. 54] and are, therefore, not gratuitous of the defendant company.

The army tractors were tied down to the flat car with wires. The plaintiff does not know who loaded these tractors on the flat car or where they were loaded, but the flat car was and had been at all times in the complete control of the defendant when plaintiff's work began

at Yermo, California, to which point the train had been brought by another crew. The defendant introduced no proof concerning the place or manner of loading but did acknowledge that the flat car was in its full possession and control before plaintiff commenced work, therefore, no inference can be drawn that someone else loaded these tractors, but one can be drawn that since the car had been enroute prior to the El Cajon station, the plaintiff had a right to assume that there had been proper prior inspections and that there was no latent defect or danger in the place of his work.

The defendant did not furnish the plaintiff with a safe place within which to work in pursuing his duties. There was an omission on the part of the defendant to use due care such as would be exercised by a reasonably prudent person in the maintenance of said tractors on said flat car. Such heavy tractors could not be safely secured to a flat car with inferior or ordinary wires, particularly over the very mountainous route to be taken by the freight train.

The evidence submitted by the plaintiff established a *prima facie* case of negligence and the doctrine of *res ipsa loquitor* was clearly applicable in this case. This doctrine will be set forth in detail in the argument portion of this brief.

ARGUMENT.

I.

The Evidence Was Sufficient to Support the Findings of Fact.

The plaintiff seeks to recover damages for the injuries sustained upon two (2) theories: First, the defendant is liable in that it did not exercise ordinary reasonable care in affording the plaintiff a safe place to work, and second, that liability exists under the doctrine of *res ipsa loquitor*.

The Federal Employers Liability Act was specifically designed for the protection of employees of a railroad. There is a definite duty and care owed to an employee of a railroad and foremost is the duty of the carrier to furnish an employee with a safe place to work.

Perry v. Central Vt. R. R., 63 Sup. Ct. 1062
(1942).

This action was brought under the provisions of U. S. C. A. Title 45, Sections 51 to 60. The basis of liability under this chapter is negligence on the part of the carrier. Strict construction of said statute in derogation of the common law, does not require such adherence to the letter as to defeat the obvious legislative purpose. These sections of the statute, pertaining to liability for injuries to employees, should receive a liberal interpretation.

Crecelius v. Chicago, Milwaukee & St. Paul R. R. Co., 233 S. W. 214.

This action is a remedial one and being brought under remedial legislation, should have a liberal construction to

advance the remedy proposed and to correct the evils against which it was directed. It was designed to enlarge, not to restrict, the rights of the injured workman.

Baltimore R. R. Co. v. Brenson, 98 Atl. 225.

Johnson v. S. P. Co., 25 Sup. Ct. 158.

Sections 51 to 60 of this title should be liberally construed so as to effectuate the intention of Congress.

Rogers v. Ft. Worth R. R. Co., 91 S. W. (2d) 458.

The negligence of a railroad under this chapter may be determined by viewing its conduct as a whole, especially where the elements indicating negligence are closely interwoven and where each imparts character to the others.

Blair v. Balt. & O. R. R. Co., 65 Sup. Ct. 545.

And the negligence of a railroad may be shown by direct or circumstantial evidence.

Bevan v. N. Y. C. & St. L. R. R. Co., 6 N. E. (2d) 982 (1937).

In the case before the court, the negligence of the defendant railroad company has been clearly shown by the evidence. The defendant was negligent in securing a heavy army tractor to a flat car in such a manner that a reasonably prudent man would know that the wires used would be unable to hold said equipment for the length of time required, and over the mountainous territory it had to travel. The defendant had notice that wires used in this manner could break and often did break [R. 156].

“The common law duty of an employer to use reasonable care in furnishing an employee with a safe place to work becomes more imperative as the risk

increases so that the 'reasonable care' becomes a demand of higher supremacy, but in all cases it is a question of reasonableness of care depending on the danger attending the place or the machinery."

Bailey v. Central Vermont R. R., 63 S. Ct. 1062 (1943).

"The common law employer had the duty of using reasonable care in furnishing his employees with a safe place to work. The common law rules for determining negligence on the part of an employer toward the employee are controlling on the question on what constitutes negligence within the meaning of this chapter."

McGiven v. Northern Pac. R. R. Co. (C. C. A., Minn. 1942), 132 F. (2d) 213.

The appellant argues that there is absolutely no evidence to support a finding that the allegations, paragraphs V and VI of the plaintiff's complaint, are true.

In its answer the defendant admitted ownership of the flat car upon which these army tractors were loaded [R. 5], and that plaintiff was defendant's employee at the time of the accident [R. 5]. The tractors on the flat car were army tractors and the only evidence of the shipping origination of these army tractors is the conclusion by the plaintiff [R. 203] that they came from "somewhere in Utah, some big base in Utah." The defendant did not introduce any evidence to prove that it did or did not load these tractors on the flat car but argues, without

any proof of the fact, if it is a fact, that a consignor loads in all cases where the shipment consists of a car-load or more. The defendant desires this court to assume that the Government loaded this car and that the defendant had nothing to do with said loading. It is submitted that such assumption is unwarranted. We have here a flat car belonging to the defendant, operating on a track under the control and supervision of the defendant, so the only reasonable inference is that the defendant either loaded the equipment upon this flat car or supervised and managed the loading thereof, or at least inspected it before accepting the loaded car for shipment.

Evidence was presented by the plaintiff that the army tractors were improperly secured to the flat car by worn, frayed, weather beaten and dark coated wires, which were inadequate to hold the tractors in place [R. 203], and that on previous occasions, wires holding similar equipment had been found broken [R. 156]. The defendant was negligent in permitting or accepting for trans-shipment, these army tractors to be so secured and the defendant knew or should have known that wires might break during a long trip, causing said army tractors to become loose and thereby creating an unsafe condition for its employees, whose duty it was to walk across said flat car.

The appellant admits (App. Br. p. 5) that paragraph VI of the plaintiff's complaint could conceivably be supported by the evidence on the charge that the defendant

failed to provide a reasonably safe and proper place for the plaintiff to work and as a result thereof, the plaintiff was caused to and did fall from the train. This concession by the appellant is sufficient to substantiate the decision by the trial court that the allegation of the plaintiff in paragraph VI of his complaint is true [R. 3, R. 9].

“ . . . the Appellate Court will generally make all reasonable presumptions that the verdict is based on sufficient evidence and will not presume that the verdict is without evidentiary support or is opposed to the weight of the evidence.”

Sallisbury v. Compe-Rose Co., 236 Pac. 174.

It was held in *Benson and Marxer v. Riger*, 172 N. W. 166,

“If appellant makes a concession in his argument on appeal, the Supreme Court owes him no duty to ascertain whether or not the facts warrant the concession.”

The same point of law was upheld in the California case of *Harmon v. Keough*, 41 Cal. App. 773.

There is no evidence absolving the defendant for the use of the wires in question. The defendant had complete control and management of the train and the loading of its cars. There is no evidence that the train was inspected at Yermo, California, where the plaintiff boarded the train. The exact time and place at which these wires broke is not known. The plaintiff, on this particular run, always inspected the right side of the train as it was

accepted custom for either the conductor or Mr. Hopkins, another brakeman, to inspect the left side of the train [R. 90]. This accident happened on the left side of the flat car in question [R. 25]. The plaintiff, therefore, was not afforded an opportunity prior to the accident to observe whether or not these wires were broken or how the tractor was loaded. At the time of the accident, the plaintiff was performing his work by walking on top of the freight cars and flat cars while the train was moving. It was not necessary for him to pass and inspect each part of the train at regular intervals. On the evening of the accident an emergency arose which caused him to have to move quickly along the left side of the flat car from which he was thrown. Plaintiff was proceeding to investigate what appeared to be a fire under the freight car ahead [R. 25].

There was a duty on the part of the defendant company to afford the plaintiff a safe place to work and to perform his duties. By securing the equipment on this flat car in the negligent manner which had been alleged, a safe place to work was not afforded to the plaintiff in that it should have been anticipated that wires, such as those used, would break and create a hazardous condition. The defendant did not exercise reasonable or ordinary care such as would be exercised by a reasonably prudent person in the loading of said army tractors on the flat car, or accepting said cars for shipment so negligently loaded. The securing of this equipment in the manner set forth constituted negligence under the circumstances.

II.

The Doctrine of Res Ipsa Loquitur Is Applicable in This Case.

In the case of *Pitcairn v. Perry* (10th Cir. (1941), 122 F. (2d) 881; Cert. Den. 314 U. S. 697, it was held that the doctrine of *res ipsa loquitur* was applicable in an action brought under the Federal Employers Liability Act, U. S. C. A. Title 45, Secs. 51-60.

“Whenever a thing which produces an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care is exercised, the fact of the injury itself is deemed to afford sufficient evidence to support recovery in the absence of explanation by the defendant tending to show that the injury was not due to its want of care.”

Pitcairn v. Perry, supra.

It has been held that a complaint pleading negligence generally as well as specifically lays the foundation for the application of the *res ipsa loquitur* doctrine.

Hackley v. So. Pac. Co., 6 Cal. App. (2d) 211 (1935).

Furthermore, if the evidence or facts of the occurrence of an accident permits the inference of negligence, the *res ipsa loquitur* doctrine applies to the relationship of master and servant under the chapter upon which this action is based.

Seibert v. Litchfield R. R. Co., 159 S. W. (2d) 612.

Negligence was alleged generally and specifically in this action and there is sufficient evidence to prove that an

accident did occur [R. 25, R. 34, R. 36, R. 138, R. 125, R. 31, R. 127, R. 169, R. 60], thereby creating the inference of negligence under the doctrine of *res ipsa loquitur*.

Under this doctrine a *prima facie* case of evidence was established in that the loading and the condition of the tractors on the flat car was solely under the control of the defendant company, and the particular method in which said tractors were loaded proved to be defective, thereby causing the plaintiff to be thrown from the car. The burden of proceeding with the evidence shifted to the defendant to prove that the method used was proper or that it did not have any responsibility in the manner in which said loading was done. The record shows that the defendant did not present a scintilla of evidence on this point.

In an action against a railroad for the death of a brakeman, caused when the track under the railroad's control broke, causing the brakeman to fall from the engine, the court held that the sudden breaking or fracture of the rail over which the engine was passing, despite the fact of inspection and care, was such evidence as to require the submission of the issue of negligence to the jury under the *res ipsa loquitur* doctrine.

Seibert v. Litchfield R. R. Co., 159 S. W. (2d) 612.

The appellant contends that the full responsibility for the loading of these tractors should be placed upon the United States Government because they were army tractors, notwithstanding the complete lack of evidence by whom these tractors were loaded. The defendant rail-

road does not deny it accepted the shipment, even if we assume that the Government did do the loading. Therefore, the defendant must have approved the method of loading. Counsel for the defendant admitted that there was a duty on the defendant to make a proper inspection prior to accepting the shipment, and that liability would exist if the particular method of loading was improper or negligent [R. 222].

In an action under this chapter for injuries to a servant in an accident caused by a device or machine, where management, control, inspection, and repair of which were entrusted to other servants by the defendant employer, the *res ipsa loquitur* doctrine could be applied.

Bermer v. Terminal R. R. Assoc. of St. Louis, 156 S. W. (2d) 657 (1941).

The doctrine of *res ipsa loquitur* applies in a case where the instrumentality causing the accident is within the control of the defendant.

“In an action for injuries to an employee, the *res ipsa loquitur* doctrine applies only where control of the instrumentality exists in an employer or servants of an employer, other than the injured person, since the doctrine rests on the principles that those in control have been negligent.”

Dryden v. The Western Pac. R. R. Co., 1 Cal. App. (2d) 49.

It is true that the plaintiff, suing under sections 51 to 60 of Title 45 of the U. S. C. A. has the burden of proving that the injury was attributable to the carrier's

neglect. However, the *res ipsa loquitur* doctrine prescribes, as a substitute for specific proof, a method by which the plaintiff can prove such negligence.

Noce v. St. Louis-San Francisco, 85 S. W. (2d) 637.

The trial court, in finding for the plaintiff, cited *Pitcairn v. Perry* (10th Cir., 1941), 122 F. (2d) 881; Cert. den. 314 U. S. 697, in which the doctrine of *res ipsa loquitur* was applied. The appellant argues that said case is not in point with the one at bar in that the *Perry* case presented a strong inference that the defendant was negligent in failing to keep the door of a box car in proper repair, and further, that the defect in that case was not readily apparent to the employee. In the case at bar, the employer had superior or exclusive means of knowing in what manner the army tractors were secured to the flat car, and that any defect that might exist in the wires was not readily apparent to the plaintiff. In the *Perry* case the box car door became worn and corroded and was so rotten and defective that when the plaintiff and others attempted to move said door, it left its fastenings and fell on the plaintiff, injuring him. In the case at bar, the wires holding the army tractors to the flat car were worn and corroded and were not sufficiently strong enough to hold the army tractor in place, and because of that condition, said wires broke, causing the plaintiff to become entangled in them, and that circumstance, plus a sudden moving of the loose tractor on the flat car [R. 25], caused him to be thrown from the train. The duty and the responsibility of seeing that the wires were sufficiently strong to hold the army tractor was not the plaintiff's. He had no control over the particular

instrumentality nor did he have any means of knowing the dangerous condition that existed. At the time of the accident he was performing his duties and was in the process of finding out what was causing the fire on the car ahead [R. 25]. The plaintiff had no control of the train other than what would be normally considered to be his duties. If these wires broke between the period of time that elapsed from the point of last inspection to the point of the accident, then the plaintiff would have been unable to ascertain whether or not this condition existed and, therefore, the set of facts that existed in the *Perry* case are in point with the set of facts in the case at bar. It was further held in the *Perry* case

“in an action against an employer for injuries to an employee because of a defect in an instrumentality under the employer’s control, the employer’s superiority or exclusive means of knowledge thereof is basis for the adoption of the *res ipsa loquitur* rule, requiring the employer to explain the occurrence.”

If proper care had been used in the securing of these army tractors these wires would not have broken. The defendant railroad knew or should have known that this manner of securing heavy equipment was inadequate, in view of the fact that such wires had broken on previous occasions [R. 156]. The fact that the wires did break indicates negligence.

The court held in *McAuliffe v. N. Y. C. & H. R. R. Co.*, 150 N. Y. S. 512, that

“the doctrine of *res ipsa loquitur* applies where the accident complained of was such that it would not have occurred if proper care had been used.”

The appellant insists that there was a lack of evidence on the part of the plaintiff establishing what caused the accident.

In *Ramsouer v. Midland Valley R. R. Co.*, 44 F. Sup. 523, it was held:

“The plaintiff was not deprived of the benefit of the *res ipsa loquitur* doctrine because of the introduction of evidence which does not clearly establish the facts or leave the case of accident in doubt.”

The appellant maintains that the carrier was obligated to accept the tractors for transportation as prepared by the shipper, but admits that if there was evident negligence in such preparation that the carrier need not accept the shipment [R. 222]. This certainly indicates that the defendant railroad did have control and supervision over the manner in which these tractors were loaded and that the defendant was negligent in permitting such heavy equipment to be secured to a flat car with wires that could not, and did not, serve the purpose for which they were used.

In this case the facts definitely warrant an inference of negligence on the part of the defendant railroad and, therefore, the doctrine of *res ipsa loquitur* is applicable, as the trial court correctly found [R. 8]. The plaintiff suffered injuries as a result of an accident caused by an instrumentality which was solely under the inspection and control of the defendant railroad and other servants of said defendant. When this equipment was originally placed on the flat car, the loading, securing and final approval of said loading was made by the defendant. The plaintiff had nothing to do with this inspection. He could rightly assume that such equipment would be prop-

erly secured so that it could stand the rigors of a long trip over mountainous territory. The burden of proceeding with proof properly shifted to the defendant to explain why this tractor was so secured to the flat car and to submit sufficient evidence to overcome the presumption of negligence placed upon it under the doctrine of *res ipsa loquitur*. The accident would not have occurred if proper care had been used by the defendant.

In *St Louis-San Francisco R. R. Co. v. Bishop*, 33 S. W. (2d) 383, a set of facts similar to the case at bar, a brakeman, whose duties were the same as that of the plaintiff, fell off of the train when a grab iron on the side of the car broke as he attempted to take hold of it. The court stated:

“Where a careful, vigorous brakeman went safely over freight cars until reaching a defective grab iron and fell on that side of the car where blood was found on the wheel, it was sufficient to justify the conclusion that the defective grab iron caused the fall.”

It cannot be maintained that there was a duty upon the brakeman in the case just cited to discover that the grab iron was defective, and it certainly cannot be maintained in the case at bar that there was a duty upon the plaintiff to discover that the wires were broken while he was attempting to investigate a fire on a freight car ahead. The appellant places the plaintiff in a position where it was his duty to afford himself a safe place to work and that he should have rectified the condition by proper inspection.

The appellant cites the case of *McGivern v. M. P. Ry. Co*, 132 F. (2d) 213. The facts are not in point with that of the case at bar. In that case the plaintiff was

fully aware of the conditions existing at his place of employment. He saw that the snow was falling and knew that ice and snow had accumulated on the footboard, and he could have rectified that condition by using the tools made available to him for that purpose. In the case at bar, there was no notice given to the plaintiff that the wires had broken and he did not know of the unsafe condition that existed at the time that he had to move quickly to the scene of the fire that appeared on one of the cars ahead of him [R. 25]. The plaintiff had no knowledge or no opportunity to rectify the particular defect that existed and which caused him to be thrown from the train.

The appellant also cites *Duffy v. Hobbs, Wall & Co.*, 166 Cal. 210, as being in point. It is submitted that the facts in this case are such that it cannot be used as authority, contradicting the point of law presented by the plaintiff. In this case a decayed post, holding a railing, gave way, precipitating the employee into the water. It was held that it was a duty of that employee to remedy that particular defect and to keep the premises safe. He had not only the duty to look for defects but had the opportunity to observe what defects existed. In the case at bar, the plaintiff had no such opportunity presented to him to observe the particular defect that existed. At the time of the accident an emergency had arisen and he was acting in accordance with that emergency. The circumstances in both cases are not the same.

The following cases and portions of the decisions therein are further cited in support of the theory that the doctrine of *res ipsa loquitur* is applicable in this case:

“In an action brought under the Federal Employers Liability Act the plaintiff did not assume the risk of his employment under the circumstances so as to preclude him from recovering damages for injuries sustained from slipping upon grease deposited and left on the running board by the negligence of a fellow employee unless he knew or by the exercise of reasonable care should have known, that it was there. In the absence of proof by the defendant railroad company of a habit of workmen to leave grease on running boards, a fellow servant may not be presumed to anticipate that dangerous practice, and in said action where a plaintiff established a *prima facie* case of negligence on the part of some co-employee in leaving a lump of grease on the running board, it was not necessary for him to prove just who dropped that grease on the board.”

Crabtree v. The Western Pac. R. R. Co., 33 Cal. App. (2d) 35.

In the case at bar it was not necessary for the plaintiff to prove who did the actual securing of the army tractors to the flat car. The burden cannot be imposed on the plaintiff employee to anticipate that the wires would break and create an unsafe place for him to work. The appellant urges that there was no evidence that the wires were unsuitable and that there was no evidence of negligence of any sort as to what caused the breaking of the wires. The fact that the wires did break and that they were insufficient to properly secure the army tractors is adequate evidence that the wires were unsuitable and that there was negligence on the part of the defendant.

In *Cason v. Kansas City Term. R. R. Co.*, 123 S. W. (2d) 133, it was held:

“In a switchman’s action against a railroad for injuries allegedly caused by a defective hand brake on a freight car on which the switchman was riding, the switchman was not required to rely on proof of a specific defect in the brake equipment nor to prove negligence of the railroad.”

The court has many times held contrary to the appellant’s contention that the plaintiff had to look out for himself and to remedy any defects that might exist in order to afford himself a safe place to work.

“In an action to recover for wrongful death of a switchman who slipped from the foot board of an engine on which there were particles of coal, evidence was sufficient to show defendant’s neglect and that the death was caused thereby.”

Castle v. Union Pacific R. R. Co., 166 N. W. 767.

“In an action for injuries to a fireman by slipping on an oil tank of a locomotive, a finding that it was not ‘usual and customary’ for oil and grease to be on such engines was sustained by the evidence and was sufficient to sustain a finding of negligence on the part of the defendant.”

Gulf, C. & S. F. R. R. Co. v. Crow, 220 S. W. 237.

In the case at bar, it was not “usual and customary” for broken wires to exist on these flat cars and a finding of negligence on the part of the railroad was supported by the evidence.

The plaintiff, in performing his duties on and about the railroad cars, has the right to assume that said cars

were loaded properly and that the manner in which they were loaded afforded him a safe place of employment.

Morey v. Main Central R. R. Co., 133 Atl. 92.

“The slippery condition of a car or platform is not to be assumed by a brakeman.”

York v. Chicago R. R. Co., 198 N. W. 377.

“A brakeman did not assume the risk of injury from a fellow employee’s negligence, inspection, or manner in which a load on a freight car was secured.”

Mich. Central R. R. Co. v. Schaffer, 136 C. C. A. 413.

In applying the test as to what constituted proper loading the court held in *Lane Bros. Co. v. Couch*, 112 C. C. A. 659:

“Where a fireman employed on a locomotive used in construction work to push freight cars loaded with bridge timbers had been killed by the insufficiency of one of the standards on such a car, which allowed a timber to fall therefrom, it was held that an instruction that the defendant was not liable if the ties were loaded and handled in the way usual and ordinary on such a construction track was properly reviewed; ‘for’ said the court, ‘it overlooked the contingency that a method may be ordinary and still be dangerous or reckless. The criterion is not merely the custom, but the custom of ordinary prudent operators.’”

Appellant’s contention that the method of loading the army tractors was the usual method is unsupported by the evidence and is untenable. Appellant sets forth on page 13 of its brief, that there is uncontradicted evidence in the record that the defendant exercised due care in accepting the shipment and in caring for it enroute. There

is no evidence whatsoever in the record to substantiate this contention.

The defendant railroad company should have known, by exercising reasonable care such as would be exercised by a prudent person, that securing such heavy equipment to a flat car with wires created a dangerous condition, taking into consideration that said flat car and tractors were destined to travel a long distance over mountainous territory. This accident would not have happened had the defendant company not used worn and defective wires. The securing of these tractors was solely within the control of the defendant and there was no burden upon the plaintiff to prove how or in what manner the wires broke. The doctrine of *res ipsa loquitur* is applicable in this case. An accident did happen, the wires did break, and said loose wires, plus the movement of the tractor, did cause the plaintiff to be thrown from the flat car, therefore, establishing a *prima facie* case of negligence. The defendant did not overcome the burden of going forward with the evidence to rebut this presumption of negligence. No evidence was submitted by the defendant to show that it properly secured these tractors on the flat car, or that it properly supervised said loading, or made an inspection before accepting this shipment, or to show that it used reasonable care in affording a safe place of employment for the plaintiff. If it is to be believed as argued by counsel for the defendant, that actual or constructive knowledge must be shown in order to find the defendant guilty of negligence, the intent of the Federal Employers Liability Act will be circumvented and the protection that a railroad employee should have would be lost. The Federal Employers Liability Act was primarily created to protect the employee in cases such as the one before the court [R. 217].

III.

There Was Evidence That the Negligence of the Defendant Was the Proximate Cause of the Accident.

The defendant is liable in that it did not exercise ordinary reasonable care in affording the plaintiff a safe place to work. Under the Federal Employers Liability Act there is created a definite duty and care toward an employee of a railroad by the employer and foremost is the duty of the railroad to furnish the employee with a safe place to work. The contention by the appellant that this duty was placed upon the plaintiff in the case at bar is not substantiated by the facts nor by the law, moreover, there is a common law duty of an employer to furnish his employee with a safe place to work and to use reasonable care in so doing. The defendant furnished the plaintiff a loaded flat car upon which he was to perform his work. The manner in which this flat car was loaded was solely within the knowledge and control of the defendant. The defendant's attempt, in its opening brief, to excuse itself from the negligent loading of these army tractors is not substantiated by any evidence in the record.

On page 5, paragraph 3 of the appellant's opening brief, the appellant admits "the second portion of paragraph VI is the only allegation in the complaint which makes a charge which could conceivably be supported by any evidence in the case." This is the charge that the defendant failed to provide a reasonably safe and proper place for the plaintiff to work, which was the proximate cause of the

plaintiff's falling from the train. The appellant, therefore, admits that there is evidence in the case to support the allegation of negligence.

"If there is nothing before it which shows that the verdict was in fact without evidentiary support or against the weight of the evidence, the appellate court will make all reasonable presumptions in favor of the sufficiency of the evidence to support the verdict and view the evidence in the light most favorable to the verdict giving it the benefit of all reasonable inferences therefrom."

Corpus Juris Secundum, Vol. 5, p. 1562, subd. D.

"The party attacking a verdict on the ground that it is without evidentiary support or contrary to the weight of evidence has the burden of establishing his contentions, for, the appellate court will generally make all reasonable presumptions that the verdict is based on sufficient evidence and will not presume that the verdict is without evidentiary support or is opposed to the weight of evidence."

Sallisbury v. Compe-Rose Co., 236 Pac. 174;

Lerner Shops of Ala. v. Riddle, 164 So. 385;

Campbell v. Bradbury, 176 Pac. 685.

The appellant asserts that there was no evidence that it had anything to do with the use of the wires in question and that the only inference was that Government employees had used them. This is a violent assumption on the part of the appellant in his argument in that there is no evidence in the record that Government employees had anything to do with the loading of these army tractors on the flat car, and it is untenable in that this was the defendant's train and under the exclusive control and

supervision of the defendant at the time that the plaintiff went to work at Yermo, California. If there is any inference to be drawn as to who loaded this particular flat car it can only be that it was done by the defendant and under the control and supervision of the defendant. Even if we were to guess that the tractor was loaded by some Government employee, the defendant still had the right and duty of inspecting it to determine if it had been properly loaded and secured, for the duty still would devolve upon the defendant of furnishing a safe place for the plaintiff to work.

“Although it is sometimes said that the appellate court must accept undisputed evidence as true, if there is a conflict in the evidence the appellate court will presume that the jury resolved the conflict in favor of the party for whom the verdict was rendered, and, unless it is opposed to the physical facts or inherently incredible, it will assume the truth of such party’s evidence, which will be viewed in the light most favorable to the verdict and given the benefit of all inferences that may reasonably and legitimately be drawn therefrom.”

Bellon v. Silver Gate Theatre, 47 P. (2d) 462;

Truidner v. Knight, 257 Pac. 451;

Lindemann v. San Joaquin Cotton Oil Co., 55 P. (2d) 870.

As stated above, the appellant concedes that there was evidence to substantiate the plaintiff’s allegation of negligence, but attempts to overcome this by unsupported and inaccurate inferences.

It was held:

“If appellant makes a concession in his argument on appeal, the Supreme Court owes him no duty to ascertain whether or not the facts warrant the concession.”

Benson & Marxer v. Riger, 172 N. W. 166.

The defendant is liable under the theory of *res ipsa loquitur* in that the plaintiff established a *prima facie* case of negligence [R. 8]. The trial court based its decision on the case of *Pitcairn v. Perry* (10th Cir., 1941), 122 F. (2d) 881; Cert. Den., 314 U. S. 697. This was discussed in detail in the preceding section. The *prima facie* case was established in that the loading and the condition of the tractors on the flat car was solely under the control of the defendant company. The defendant employer had full management, control, inspection and repair of the particular device or machine that was concerned in this accident and under these circumstances, the *res ipsa loquitur* doctrine was applicable. The application of the doctrine of *res ipsa loquitur* raises an inference of negligence which must be overcome by the defendant.

Anderson v. Jameson Corp., 59 P. (2d) 962.

The defendant did not introduce any evidence whatsoever to overcome the *prima facie* case of negligence that had been established by the plaintiff. The evidence presented by the plaintiff, together with the admission by the defendant that it was the owner of the particular equipment involved, created a reasonable inference that the defendant had loaded and had complete supervision over the instrumentality involved.

In *Baumann v. Harrison*, 115 P. (2d) 530 (1941), the court held that the decision of a trial court may be rested upon reasonable inferences as well as upon direct evidence.

The defendant, having failed to show a lack of negligence on its part, and that the injury was not due to its want of care, thereby permitted the plaintiff to prevail on the ground that the negligence of the defendant was the proximate cause of the accident.

IV.

There Was Evidence of Proximate Cause Between the Accident and the Injury.

The evidence was clear that the plaintiff sustained an injury to his abdomen at the time of the accident [R. 25, R. 26, R. 27, R. 28, R. 30, R. 31, R. 33, R. 125, R. 130, R. 131, R. 132, R. 133, R. 139, R. 141, R. 143]. The record is replete with testimony that the plaintiff suffered an injury at the time that he was thrown from the flat car and said evidence is not "unconvincing testimony" as the defendant states on page 19 of its opening brief.

The plaintiff kept a small book in the regular course of his employment in which he made daily notations. This book was admitted in evidence as Plaintiff's Exhibit No. 3 [R. 45]. In that record book [R. 169], there is a notation after the date of January 22nd (which was the day following the accident) which says, "reported to doctor, Yermo." This corroborates the testimony of the plaintiff and the other witnesses to the effect that the plaintiff suffered an immediate injury and this is unimpeachable evidence that the plaintiff did see a doctor, Dr. Ballachey, shortly after the accident [R. 33]. Dr. Ballachey did not

“categorically deny” that no hernia was present before February 16, 1944, as the appellant asserts on page 19 of its opening brief, but admitted that it was possible that he may have examined the plaintiff on the return trip after the accident [R. 108] (January 22, 1944).

The plaintiff produced evidence that an immediate report of the accident was made by letter, Plaintiff’s Exhibit No. 5 [R. 170, R. 171]. The defendant acknowledged the receipt of this report in a letter dated February 13, 1946, Plaintiff’s Exhibit No. 4 [R. 60]. All of this presented a preponderance of evidence on behalf of the plaintiff, that he did suffer an immediate injury contrary to the appellant’s assertion that evidence as to the time and nature of the injury is vague.

The defendant seeks to overcome the effect of this evidence by the introduction of accident reports signed by the plaintiff and by other employees to the effect that the plaintiff did not suffer an injury at the time of the accident. The plaintiff explained the inconsistency between the report dated March 4, 1944, and his testimony in court [R. 73, R. 74]. He stated that at the time of that report the swelling on his abdomen was getting worse and that at the time of the accident he did not think that he was seriously injured. The plaintiff’s testimony was the same in explaining the accident report dated April 22, 1944 [R. 76]. The plaintiff testified in further explanation of these signed statements that he was afraid to tell the defendant’s claim agents how badly he was hurt because he thought that they would pull him out of service and he would be unable to feed his wife and seven children [R. 99]. These statements were typed by the defendant’s agents and were worded in the particular way

in which they saw fit [R. 99]. He was told to sign these reports, which he did, and was told that there was nothing for him to worry about [R. 63, R. 100].

The defendant refers to a signed statement by Kenneth Anderson, the rear brakeman, in an attempt to show that the plaintiff did not suffer an injury at the time of the fall (App. Op. Br. pp. 20 and 21). Kenneth Anderson does not deny signing this statement. He testified in court that the plaintiff did suffer an injury at the time of the fall and that the plaintiff complained that his "stomach was sore" [R. 143].

Robert Hopkins explained the signed statement introduced by the defendant by stating that this report was made out some time after the accident but that he associates the plaintiff's report to him of having a pain in his abdomen with the accident.

The plaintiff and the other witnesses who work for the railroad company are hard working railroad men and their explanation of what they meant by the word "injury" is quite different than what was meant by that word in the accident reports drawn up by the defendant's agents. There is a presumption that they were speaking the truth when on the witness stand in court. The trial judge listened to their testimony and observed their demeanor in court. The trial judge believed the testimony of the plaintiff and the other witnesses to the effect that the plaintiff was injured at the time of the fall [R. 214, R. 215, R. 216]. The trial judge further stated that there was a preponderance of evidence in favor of the injury having been sustained as of the time of the fall [R. 227].

"The appellate court will not disturb the findings if it cannot say that a reasonable man could not have

reasonably reached the conclusions reached by the trial court.”

Taylor v. Bunnell, 23 P. (2d) 1062.

“This court has held that when the evidence on material issues so conflicts that it cannot be reconciled, this court will consider the fact that the trial court observed the witnesses, their manner of testifying, and must have accepted one version of the facts rather than the opposite.”

Cary v. Reiter, 240 N. W. 582.

“An appellate court does not, of course, see the witnesses or hear their testimony. We have before us nothing but the cold record, whereas the trial judge is in a position to observe the witnesses while they are on the witness stand giving their testimony. He has before him the parties directly involved and can observe their demeanor and the demeanor of the witnesses during the trial and is, therefore, in a far better position than is possible for an appellate court to be to weigh the evidence and to determine where the truth lies. It is because of this advantageous position of the trial judge that appellate courts, in reaching their conclusions in close cases where the evidence is conflicting, defer somewhat to the judgment of the trial judge, even though they are not bound by such judgment.”

Colaks v. Colaks, 75 S. W. (2d) 600, 603.

“Where the appellate court finds that it is wholly unable to determine where the preponderance of the evidence lies, it treats the findings of the trial court as persuasive and adopts such findings as its own.”

Maloy v. Maloy, 271 S. W. 13.

It is submitted that the evidence was sufficient to justify a decision by the trial court that there was a proximate causal connection between the accident and the injury. In addition to the abdominal injury, the plaintiff sustained a broken tooth, a cut lip, and a cut knee [R. 27, R. 125]. The defendant did not contend that the plaintiff did not suffer these other injuries.

V.

Damages.

The evidence produced on the part of the plaintiff showed that as a result of the negligence on the part of the defendant and the fall occasioned thereby, the plaintiff lost one hundred and seventy-seven (177) days' work [R. 8, R. 53]. The plaintiff testified that he was paid a wage of eight dollars and 24/100 (\$8.24) for each one hundred miles and that he averaged one hundred and sixty-four (164) miles per day [R. 8, R. 54]. On the basis of one hundred seventy-seven (177) days lost the plaintiff sustained damages in the sum of two thousand three hundred and eighty-three dollars and 66/100 (\$2,383.66) in loss of earnings [R. 8].

The trial court fixed the sum of five hundred dollars (\$500.00) as a nominal award for pain and suffering [R. 8].

The total sum of damages sustained by the plaintiff as a result of this accident was found to amount to two thousand, eight hundred, eighty-three dollars and 66/100 (\$2,883.66).

VI.

**The Decision of the Trial Court Should be Affirmed
Where There Is Evidence to Support the Findings.**

The trial court, in its findings of fact and conclusions of law, found that the allegations contained in paragraphs I, II, III, IV, V and VI of plaintiff's complaint were true. The trial court found that as a direct and proximate result of the defendant's negligence and carelessness, as alleged in said paragraphs V and VI of the plaintiff's complaint, plaintiff sustained injuries to his person and that the muscles, tissues, walls and membrane in plaintiff's abdomen were severely torn, lacerated and ruptured, and that he became sore and lame and suffered pain, all to his damage in the sum of five hundred dollars (\$500.00). The trial court further found as true that as a direct and proximate result of the defendant's negligence and failure to provide a safe and proper place for the plaintiff to work and by reason of his said injuries, plaintiff was prevented from following his usual vocation as a brakeman for a period of one hundred and seventy-seven (177) days to his damage in the sum of two thousand, three hundred and eighty-three dollars and 66/100 (\$2,383.66) [R. 9, R. 10].

The trial court further held in its findings that the allegations contained in paragraph VI of the defendant's answer were not true [R. 10].

"The appellate court will review or examine the record to determine whether the evidence supports the findings or there is evidence which conclusively

establishes the facts other than as found as a matter of law; but, if the findings are supported by the evidence or it cannot be said as a matter of law that the facts are other than as found, the judgment of the lower court will not be disturbed.”

Corpus Juris Secundum, Vol. 5, p. 699, par. 1656.

“When considering whether the findings have proper evidentiary support, the appellate court will eliminate from consideration all incompetent and immaterial evidence and consider only the evidence most favorable to the successful party, including all reasonable inferences which might have been drawn therefrom, which will be construed most strongly in favor of the judgment.”

Corpus Juris Secundum, Vol. 5, p. 700, par. 1656.

“Findings of the trial court, supported by circumstantial evidence, will not be reviewed on appeal.”

Byers Bros. & Co. Live Stock Commission Corp. v. McKenzie, 239 Pac. 525.

“To justify a reversal, the failure or insufficiency of the proof must relate to a vital point in the case and amount to a complete absence of substantial supporting evidence, or the evidence must be so slight as to show an abuse of discretion. If findings, which will uphold the judgment are adequately sustained by the evidence, there will be no reversal because of the insufficiency of the evidence as to other or immaterial findings . . . If there is evidence which supports the findings, they will not be disturbed for

lack of support simply because there is other evidence which, if believed and accepted, warrants findings the other way.

“That the supporting evidence is somewhat weak and unsatisfactory, or vague and uncertain, or consists of competent opinions and conclusions of witnesses, will not cause the appellate court to review to sustain the findings; and the testimony of only one witness may be sufficient to support the findings.

“Credibility of witnesses, as previously noted in subsection B is a thing which the appellate court will not ordinarily concern itself, and seldom will the findings be disturbed for interest or lack of credibility of the witnesses if, when assuming their testimony to be the truth, it adequately supports the findings.”

Corpus Juris Secundum, Vol. 5, pp. 720, 721, par. 1656.

“Fact findings of the trial court, based on substantially conflicting oral evidence, and not unwarranted as a matter of law, are accorded particularly great weight and are almost universally regarded as binding on the appellate court.”

Corpus Juris Secundum, Vol. 5, p. 722, par. 1657 (a).

It is submitted that there is sufficient evidence in the record to sustain the findings of fact and conclusions of law as found in this case by the trial court [R. 9, R. 10].

Conclusion.

The trial court found, from the evidence and the law applicable thereto, that the defendant was negligent in failing to provide the plaintiff with a safe place of employment, and that the plaintiff had established a case of negligence as against the defendant under the doctrine of *res ipsa loquitur*. As a result of this negligence on the part of the defendant, the plaintiff sustained injuries to his person which caused him pain and suffering, and prevented him from working for a period of one hundred and seventy-seven days.

Judgment of the trial court in favor of the plaintiff should be affirmed.

Respectfully submitted,

DESSER, RAU & CHRISTENSEN,

By JACK L. KAREN,

• *Attorneys for Appellee.*

No. 11433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT DEL GUERCIO, District Director Immigration and Naturalization Service, Department of Justice, District No. 16,

Appellant,

vs.

SEBASTIAN GABOT,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

NOV 1-1936

PAUL P. D'ERIEU,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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In the United States District Court
Southern District of California
Central Division
No. 5458-PH

In the Matter of
SEBASTIAN GABOT,
Petitioner.

PETITION FOR WRIT OF HABEAS CORPUS

Comes now the Petitioner Sebastian Gabot and files this his Petition for Writ of Habeas Corpus and respectfully alleges as follows:

I.

That your petitioner was born on the 8th day of April, 1909 at Binalonan, P. I., and was admitted to the United States for permanent residence on September 30th, 1927 at Honolulu, T. H., arriving in continental United States on or about the 29th day of July, 1929. That petitioner has resided in the United States continuously since said entry, a matter of about seventeen years. His family consists of one brother residing in Salinas, California; that he has no relatives of any degree so far as he has been able to determine in the Philippine Islands.

II.

Petitioner was convicted of second degree murder in the Superior Court of the State of California at San Luis Obispo on or about March 20th, 1934. While serving time at San Quentin Penitentiary at Marin, Cal., on or about March 20th, 1935, petitioner was interviewed by an [2] Officer of the U. S. Immigration Service. Peti-

tioner was twenty-six years old at that time and had an additional six and one-half years to serve. The said Officer stated to the petitioner that he would be deported from the United States anyway, and if he would sign a consent to deportation that the Inspector would get him out of prison and send him to the Philippine Islands within a year. Petitioner stated that, if released he was then young enough to rehabilitate himself and make something out of life. The Inspector then wrote a consent agreement and asked the petitioner to sign the same. The petitioner did as he was requested but he was not released from imprisonment as promised.

III.

Your petitioner has cancelled, rescinded and withdrawn his consent to deportation given as aforestated and hereby again does cancel, withdraws and rescinds said consent to such deportation.

IV.

That the hearing on the Deportation Warrant was conducted while petitioner was in prison. He was not represented by counsel. He consented to the deportation under the circumstances as aforestated, and hearing was most perfunctory in form and limited in scope. Petitioner was not advised that there was a provision in the law, under terms of which he could apply for relief, even though having been convicted as aforestated. He was not advised that without his consent he could not be deported until he had served his term of imprisonment. He was not

advised that he was entitled to witnesses on his own behalf, and a perusal of the record indicates that no attempt was made to locate or contact such witnesses. In view of such facts, petitioner believes and here alleges that he was not given a full, fair and complete hearing.

V.

From on or about the 20th day of March, 1935, Petitioner was never advised that the Bureau of Immigration had a warrant of [3] deportation, nor was he advised by the Bureau of Immigration that a warrant of deportation was outstanding against him, until on or about the 16th day of April, 1946, he received a notice from the District Director of Immigration and Naturalization at Los Angeles, California, to report at that office on April 16th, 1946, for the purpose of being deported to the Philippine Islands. Petitioner on the 24th day of May, 1946, engaged present counsel and a motion to Reopen said hearing on the said Deportation Warrant was filed on the 31st day of May, 1946 with the Board of Immigration Appeals, United States Department of Justice, Washington, D. C., and said motion is now pending before said Board of Appeals, and neither Petitioner nor his Counsel have been advised of the action taken therein.

VI.

Petitioner alleges that Deportation without his consent and against his wishes is illegal under the present laws of the United States governing such matters. The record of hearing in this case was reviewed in the office

of the District Director of Immigration & Naturalization at Los Angeles, California by Petitioner's Counsel, and the facts herein stated are obtained from perusal of said records.

VII.

That Petitioner has surrendered himself in accordance with the Notice hereinbefore referred to and is now held in custody of the District Director of Immigration and Naturalization at Los Angeles, California.

VIII.

That he is not held by virtue of any complaint, indictment, presentment, warrant, rule, regulation or order, except as above set out; that no other application for a Writ of Habeas Corpus has been made for or in behalf of Petitioner.

Wherefore, petitioner respectfully prays that a Writ of Habeas [4] Corpus be issued that a return date on the same be set; that Petitioner be restored to his liberty; that the hearing on the outstanding warrant of deportation be ordered reopened so that the records pertaining to petitioner may be completed to show the full, true and complete facts in connection with all the matters at issue.

L. A. GORDON and HARRY WOLPIN

By Harry Wolpin

Attorneys for Petitioner [5]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES

The right of an alien to maintain a suit in equity to cancel an order of deportation and a bail bond given in the deportation proceeding has been denied on the ground that such alien has an adequate and complete remedy by habeas corpus.

Fafalios v. Doak, (App. Dec.) 50 F. (2d) 640.

It is not the function of the courts to examine particular steps and rulings in a deportation proceeding, but only to determine whether or not the proceedings as a whole meet the requirements of due process of law.

Berkman v. Tillinghast, (C. C. A. Mass.) 58 F. (2d) 621.

A hearing may be rendered unfair by the fact that the immigration official who conducted the hearing has prejudged the case and intends to make or recommend an order of deportation.

Strench v. Pedaris, (C. C. A. Wyo.) 55 F. (2d) 597.

The Court has authority to modify a warrant of deportation so as to permit the alien to voluntarily depart from the United States.

U. S. ex rel. Karamian v. Curran, (C. C. A. N. Y.) 16 F. (2d) 958. [7]

A deportation order requiring the proper official to return an alien to the country whence he came, and for that purpose to furnish transportation for him, means

that the transportation is to be obtained and the deportation effected within a reasonable time. . .

U. S. v. Wallis (C. C. A. N. Y.) 279 F. 401.

An alien arrested for deportation to Russia was entitled to be deported or have his freedom, and he could not be required to furnish a bond and report at intervals to the immigration commissioner until he could be deported to Russia, notwithstanding deportation to Russia was not possible because of lack of recognition of the Soviet Government by the United States.

Petition of Brooks, (D. C. Mass.) 5 F. (2d) 258.

The detention, prior to a hearing, of an alien whom it sought to deport and acts of government officials with respect to such detention are a part of the proceedings for deportation and the fairness required in the proceedings generally must attend such detention and acts.

Ex parte Eguchi, (D. C. Cal.) 58 F. (2d) 417.

A warrant of deportation should be executed within a reasonable time.

U. S. ex rel. Lisafeld v. Smith (D. C. N. Y.) 2 F. (2d) 90.

The proceedings for deportation, although summary, must afford the alien a fair opportunity to establish his right to remain in the United States.

U. S. v. Martin, (D. C. N. Y.) 193 F. 795.

It is the duty of a Court to consider the competency and legal admissibility of the evidence presented in determining whether a fair hearing was given in a deportation proceedings.

Ex parte Morel, (D. C. ~~Mass~~ Wash.) 292 F. 423.

The Court may determine whether or not the alien has had a fair hearing.

U. S. ex rel. Ohm v. Perkins, (C. C. A. N. Y.)
79 F. (2d) 533.

Where evidence was improperly received and where but for that evidence it is wholly doubtful whether the requisite finding would have been made, there the order of deportation is without a fair hearing which may be corrected on habeas corpus. See *Vajtauer v. Commissioner*, 273 U. S. 103, 106.

Bridges v. Wixon, etc., 326 U. S. 135. [8]

U. S. v. Uhl, (C. C. A. N. Y.) 271 F. 676.

Sec. 19 of the Immigration Act of Feb. 5, 1917, as amended, provides in part:

“Provided further, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having been first given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment.”

A mere parole is not a termination of imprisonment within the immigration act of Feb. 5, 1917, section 19.

Nagle v. Lim Foon, 48 F. (2d) 51.

Filing of motion for a new trial stays execution of judgment.

Code of Civil Procedure of California—Sec. 681a.

Respectfully submitted,

L. A. GORDON & HARRY WOLPIN

By Harry Wolpin

Attorneys for Petitioner

[Endorsed]: Filed Jun. 11, 1946. [9]

[Title of District Court and Cause.]

ORDER FOR WRIT OF HABEAS CORPUS

Let the Writ of Habeas Corpus issue in the above captioned matter, returnable before the Hon. Peirson M. Hall, Judge of the United States District Court at Los Angeles, California on the 17th day of June, 1946 at 10 o'clock A. M. of said day.

The Clerk is hereby directed to issue said Writ.

Dated: June 11, 1946.

PEIRSON M. HALL

Judge of the United States District Court

[Endorsed]: Issd writ. Filed Jun. 11, 1946. [10]

United States District Court
Central Division, Southern District of California

HABEAS CORPUS

The President of the United States of America
To District Director of Immigration and Naturalization
Service—Greeting:

You Are Hereby Commanded, that the body of Sebastian Gabot by you restrained of his liberty, as it is said detained by whatsoever names the said Sebastian Gabot may be detained, together with the day and cause of being taken and detained, you have before the Honorable Peirson M. Hall, Judge of the United States District Court in and for the Southern District of California, at the court room of said Court, in the City of Los Angeles at 10:00 o'clock a. m., on the 17 day of June, 1946, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable Peirson M. Hall, United States District Judge at Los Angeles, California, this 11 day of June, A. D. 1946.

(Seal)

EDMUND L. SMITH

Clerk

By E. M. Enstrom, Jr.

Deputy Clerk [11]

Received the within writ the 11th day of June, 1946.
Albert Del Guercio, District Director, by Bruce G. Barber.
Charles H. Carr, U. S. Atty., Ronald Walker, Asst. U. S.
Atty.

[Endorsed]: Filed Jun. 11, 1946. [12]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 5458-PH

In the Matter of

SEBASTIAN GABOT

for Writ of Habeas Corpus

RETURN TO WRIT OF HABEAS CORPUS

I, Albert Del Guercio, District Director, Immigration and Naturalization Service, Department of Justice, Los Angeles, California, District No. 16, respondent herein, for my return to writ of habeas corpus issued in the above case, state:

I.

That Sebastian Gabot, hereinafter referred to as the petitioner, is not being illegally restrained by me of his liberty but is in my custody under proper and lawful authority.

II.

On April 16, 1946 the petitioner was surrendered into my custody for deportation by virtue of an outstanding warrant of deportation issued on November 8, 1935 under the authority then vested in the Secretary of Labor. On the date of issuance of the writ of habeas corpus herein, respondent was in the act of arranging to convey the petitioner to San Francisco where he was to have been de-

ported on a vessel sailing from that port on June [13] 12, 1946 destined to the Philippine *Island*.

III.

On the date of issuance of the warrant of deportation on November 8, 1935, the petitioner was then serving a prison sentence and was not released from imprisonment until May 22, 1942. The warrant of deportation provides that execution thereof be deferred until such time as petitioner was released from imprisonment. Upon the release of petitioner from imprisonment on May 22, 1942 it was not possible at that time or thereafter to effect the deportation of the petitioner due to conditions resulting from the war. Shipping has been resumed and respondent is now prepared to effect the deportation of the petitioner to the Philippine Islands in pursuance of the warrant of deportation.

IV.

For further return of respondent there is attached hereto as a part of this return and marked Exhibit "A" certified copy of warrant directing the deportation of the petitioner to the Philippine Islands.

V.

For further return of respondent there is attached hereto as a part of this return and marked Exhibit "B" certified copy of hearing accorded the petitioner on September 12, 1935 to determine his right to be and remain in the United States.

Wherefore, I Albert Del Guercio, District Director, Immigration and Naturalization Service, Department of Justice, pray that the writ of habeas corpus be dismissed and that said petitioner, Sebastian Gabot, be remanded to my custody.

ALBERT DEL GUERCIO

District Director Immigration and Naturalization Service
Department of Justice, District No. 16 [14]

[Verified.] [15]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES

I.

The Courts have held that if the hearing was fair, if there was evidence to support the findings, and if no error of law was committed, the decision of the Attorney General must stand and cannot be corrected in judicial proceedings and the alien does not have a right to a hearing *de novo*.

Keesler v. Strecker, 59 S. Ct. 694, 700, 307 U. S. 22, 34.

Lee Check Hon v. Proctor, (CCA-9) 112 F. 2d 246, 247.

II.

Provision is made by act of Congress for the deportation of “* * * any alien who is * * * sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral

turpitude, committed within five years after the entry of the alien to the United States * * *."

8 U. S. C. 155. [16]

III.

Regulations of the Attorney General now make provision for the time of execution of a warrant of deportation where the alien is confined in or paroled from a penal institution. (Note: Transfer of the Immigration and Naturalization Service from the Department of Labor to the Department of Justice was effected on June 14, 1940. (5 U. S. C. Sec. 133t).)

8 Code of Federal Regulations Sec. 150.12

"Sec. 150.12(b) * * * No alien sentenced to imprisonment shall be deported under any provision of law until the termination of the imprisonment. Imprisonment shall be considered as terminated upon the release of an alien from confinement whether or not he is subject to rearrest or further confinement in respect to the same offense. Release of an alien from confinement on parole shall be considered as termination of imprisonment."

Lu Woy Hung v. Haff, 9th Cir., 78 F. 2d 836, 838.

IV.

The holding of a deportation hearing in a prison does not constitute an unfair hearing:

Rousseau v. Weedin, 9th Cir., 284 F. 565 at page 566 the court states:

“The appellant contends that he was deprived of a fair hearing, in that he was confined in the state penitentiary at the time thereof. We can find in that fact no implication that the hearing was unfair. It is true that the appellant was not represented by an attorney, but he was advised of his right to counsel, and repeatedly was asked if he desired an attorney, and always answered in the negative.”

U. S. ex rel. Wlodinger v. Reimer, 2d Cir., 103 F. 2d 435, the court states at page 436:

“On the issue of fair hearing the appellant complains that he was examined by the immigrant inspectors while in prison and without counsel, * * *. The fact *the* the hearing was held in prison did not render it unfair. The appellant was given the chance to have counsel present.”

V.

Deportation is not punishment for a crime, neither is the proceeding [17] a criminal prosecution within the meaning of the 5th and 6th Amendments to the Constitution:

Zakonaite v. Wolf, 33 S. Ct. 31, 226 U. S. 272, 57 L. Ed. 218.

The Supreme Court herein stated: “It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States, and to regulate their coming, includes authority to impose conditions upon the performance of which the continued liberty of the

alien to reside within the bounds of this country may be made to depend; that a proceeding to enforce such regulations is not a criminal prosecution within the meaning of the 5th and 6th Amendments; that such an inquiry may be properly devolved upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive, as they are made by the provisions of the act in question."

Bridges v. Wixon, 65 S. Ct. 1443, 1449, 326 U. S. 148, 147, 89 L. Ed. 2103.

Mr. Justice Douglas delivering the opinion of the Court reiterated that:

"* * * Deportation technically is not a punishment * * *."

IV.

It is well settled that deportation proceedings are summary in their nature and all that is required under the law is that the alien be given a fair hearing.

Japanese Immigrant Case, 23 S. Ct. 611, 189 U. S. 86, 47 L. Ed. 721.

Chin Yow v. U. S., 28 S. Ct. 201, 208 U. S. 8, 52 L. Ed. 369.

Gung You v. Nagle, 9th Cir., 34 F. 2d 848.

VII.

A warrant of deportation does not become functus officio and void because of delay in its execution where the delay is due to war conditions or where execution of the warrant is delayed or prevented by acts of the alien.

Seif v. Nagle, 9th Cir., 14 F. 2d 416, at page 417 the Court states:

"It is urged that the Secretary of Labor and Commissioner of Immigration have waived the right to deport in that they have waited an unreasonable time after the Department of Labor assumed jurisdiction of the detained. [18] We find no merit in the point. When the original order of 1914 was made, directing deportation to Austria, because of the war the alien could not have been deported to that country. Since the war, even as late as 1924, the alien himself has exerted efforts to prevent deportation and has been successful in obtaining several stays. But in August, 1925, the Government of Poland issued the necessary passport. No sufficient reason appears for issuing judicial process that will prevent carrying out the order *of* deportation."

See also:

Marty v. Nagle, 9th Cir., 44 F. 2d 695, cert. den.
51 S. Ct. 349, 283 U. S. 868, 75 L. Ed. 1471.

Caranica v. Nagle, 9th Cir., 28 F. 2d 955.

Restivo v. Clark, 1st Cir., 90 F. 2d 847.

U. S. v. Wallis, 2d Cir., 279 F. 401.

U. S. ex rel. Vassiliades v. Commissioner of Immigration, etc., 2d Cir., 103 F. 2d 423.

VIII.

The fact that the return of an alien to his native country may result in hardship does not change the civil nature of the deportation proceeding. There are many examples of proceedings which involve hardship, which are by law left to determination in a civil proceeding, such

as questions of paternity, legitimacy, rights of inheritance and the existence or non-existence of the *marital* status. The fact that hardship is involved in the deportation of an alien gives him no right to an asylum in this country.

Ex parte Kurth, et al., 28 F. Supp. 258.

IX.

Discretionary authority to suspend deportation or grant voluntary departure in lieu of deportation has expressly been denied the Attorney General by Congress where deportation is based upon conviction of a crime involving moral turpitude,

8 U. S. C. 155(d) "The provisions of subsection (C) shall not be applicable in the case of any alien who is deportable under * * * any of the provisions of so much of subsection (a) of this section as relates to criminals * * *." [19]

Respectfully submitted,

CHARLES H. CARR

United States Attorney

By Ronald Walker

Assistant United States Attorney

BRUCE G. BARBER

District Adjudications Officer Immigration and Naturalization Service, on the points and authorities. [20]

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION
SERVICE

June 13, 1946

Pursuant to Title 28, Section 661, U. S. Code (Sec. 882, Revised Statutes), I hereby certify that the annexed paper is a true copy of the original appearing in the record of the Immigration and Naturalization Service, Department of Justice, relating to Sebastian Gabot, file No. 12020/25089.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first written above.

(Seal)

Albert Del Guercio

ALBERT DEL GUERCIO

District Director Los Angeles District No. 16 [21]

[EXHIBIT "A"]

WARRANT—DEPORTATION OF ALIEN

12020-25089

UNITED STATES OF AMERICA

Department of Labor

Washington

No. 55898-979

To: District Director of Immigration and Naturaliza-
San Francisco, Calif.
tion, Angel Island Station, /

Or to any Officer or Employee of the United States Im-
migration and Naturalization Service.

Whereas, from proofs submitted to me, Assistant to the
Secretary, after due hearing before an authorized im-
migration inspector, I have become satisfied that the alien

SEBASTIAN GABOT alias JACK DENNY,

who entered the United States at San Ysidro, Calif., on
— — — the 20th day of March, 1934, is subject to depor-
tation under section 19 of the Immigration Act of Feb-
ruary 5, 1917, being subject thereto under the following
provisions of the laws of the United States, to wit: The
act of 1917, in that he has been sentenced, subsequent to
May 1, 1917, to imprisonment for a term one year or
more because of conviction in this country of a crime
involving moral turpitude committed within five years
after entry to wit: Murder 2nd degree,

I, Turner W. Battle, Assistant to the Secretary of
Labor, by virtue of the power and authority vested in me
by the laws of the United States, do hereby commend you
to deport the said alien to — Philippine Islands, —, at the

expense of the appropriation, "Salaries and Expenses, Immigration and Naturalization Service, 1936," including the expenses of an attendant, if necessary. Execution of this warrant should be deferred until such time as the alien is released from imprisonment.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 8th day of November, 1935.

mlh

Assistant to the Secretary of Labor [22]

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION
SERVICE

June 13, 1946

Pursuant to Title 28, Section 661, U. S. Code (Sec. 882, Revised Statutes), I hereby certify that the annexed paper is a true copy of the original appearing in the record of the Immigration and Naturalization Service, Department of Justice, relating to Sebastian Gabot, file No. 12020/25089.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first written above.

(Seal)

Albert Del Guercio

ALBERT DEL GUERCIO

District Director Los Angeles District No. 16 [23]

[EXHIBIT "B"]

U. S. DEPARTMENT OF LABOR
Immigration and Naturalization Service

Central Office File: 55898/979

Case of: Sebastian Gabot

San Quentin No. 57211

San Quentin Name: Jack Denny

San Francisco File: 12020/25089

Hearing of Sebastian Gabot
conducted by M. Bertrand Couch

Date: September 12, 1935.

Place: U. S. Immigration Office, San Quentin Prison,
California.Present: U. S. Immigrant Inspector M. Bertrand Couch
as Examining Inspector and Stenographer. For the
alien, himself, Sebastian Gabot alias Jack Denny.

Examining Officer to the Alien:

Q. What is your correct and complete name?

A. Sebastian Gabot.

Q. Have you ever used any other name?

A. Jack Denny.

Q. I now show you and serve upon you U. S. Department of Labor Warrant of Arrest No. 55898/979 issued in your name by the Secretary of Labor in Washington, D. C., on August 2, 1935. Do you clearly understand the terms of this warrant?

A. I do.

Q. Please raise your right hand. Do you swear to tell the truth, the whole truth and nothing but the truth so help you God?

A. I do.

Q. You are informed that the purpose of this hearing is to afford you an opportunity to show cause why you should not be deported from the United States. You are advised that under these proceedings you have the right to be represented by counsel of your own selection, which counsel may be an attorney at law or any person of good character and reputation. Do you wish to be so represented?

A. I will not have anyone to represent me here. [24]

Q. Are you the same Sebastian Gabot alias Jack Denny who made a statement here on April 23, 1935, concerning your presence in this country and who is mentioned in this Form 505 covering your admission to this country on September 30, 1927, at Honolulu, T. H. U. S. A. and who is mentioned in this copy of *of* commitment covering your residence in this prison?

A. Yes.

Q. You are informed that all of these documents are herewith made parts of this record of hearing, being the evidence on which this warrant of arrest was issued. Do you understand that?

A. Yes.

Q. Have you any reasons to state for this record of hearing as to why you should not be deported in conformity with the immigration laws of this country?

A. No.

Q. Warning:—

You are hereby warned that, under the Act of March 4, 1929, as amended, you will, if ordered deported and thereafter enter or attempt to enter the United States, be guilty of a felony and, upon conviction, be liable to imprisonment of not more than two years, or a fine of not

more than \$1000, or both such fine and imprisonment, unless following your departure from the United States in pursuance of an order of deportation, you receive permission from the Secretary of Labor to apply for admission after one year from the date of your departure. Do you understand this warning?

A. Yes, sir, I understand.

Q. Have you anything else that you wish to say in your own behalf before this hearing is closed?

A. I want to be sent back to my home in the Philippine Islands as quickly as they will let me be deported. I am all ready to go. I have nothing to get outside of this prison in the way of property or personal effects. That is all.

Hearing closed. [25]

U. S. DEPARTMENT OF LABOR IMMIGRATION SERVICE

Summary: Sebastian Gabot, age 23, male, married, houseboy, native and citizen of Philippines, Filipino race, last entered the United States apparently as returning resident at San Ysidro, California, March 20, 1934.

Recommendation: The charge contained in the warrant of arrest has been sustained by the evidence adduced in the hearing granted this alien and I respectfully recommend that he be returned to the country of his origin and citizenship, Philippine Islands.

(Signed) M. Bertrand Couch
Immigrant Inspector.

I certify that the foregoing is a true and correct transcript of the record of hearing in this case.

(Signed) M. Bertrand Couch

MBC

Stenographer [26]

Form W-11

U. S. Department of Labor
Immigration and Naturalization Service

WARRANT
For Arrest of Alien

UNITED STATES OF AMERICA
Department of Labor
Washington

12020/25089

No. 55898/979

To District Director of Immigration and Naturalization,
San Francisco, Calif.,

Or to any Immigrant Inspector in the service of the
United States.

Whereas, from evidence submitted to me, it appears that
the alien

SEBASTIAN GABOT alias JACK DENNY,
who entered this country at San Ysidro, Calif., on ---
the 20th day of Mar., 1934, has been found in the United
States in violation of the immigration laws thereof, and

more than \$1000, or both such fine and imprisonment, unless following your departure from the United States in pursuance of an order of deportation, you receive permission from the Secretary of Labor to apply for admission after one year from the date of your departure. Do you understand this warning?

A. Yes, sir, I understand.

Q. Have you anything else that you wish to say in your own behalf before this hearing is closed?

A. I want to be sent back to my home in the Philippine Islands as quickly as they will let me be deported. I am all ready to go. I have nothing to get outside of this prison in the way of property or personal effects. That is all.

Hearing closed. [25]

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(Signed) M. Bertrand Couch
Immigrant Inspector.

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(Signed) M. Bertrand Couch

MBC

Stenographer [26]

Form W-11

U. S. Department of Labor

Immigration and Naturalization Service

WARRANT

For Arrest of Alien

UNITED STATES OF AMERICA

Department of Labor

Washington

12020/25089

No. 55898/979

To District Director of Immigration and Naturalization,
San Francisco, Calif.,

Or to any Immigrant Inspector in the service of the
United States.

Whereas, from evidence submitted to me, it appears that
the alien

SEBASTIAN GABOT alias JACK DENNY,

who entered this country at San Ysidro, Calif., on ---
the 20th day of Mar., 1934, has been found in the United
States in violation of the immigration laws thereof, and

is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit: The immigration act of February 5, 1917, in that he has been sentenced, subsequent to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after entry, to wit: Murder 2nd degree.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1936." Pending further proceedings, the alien should be permitted to remain in his present location without expense to the Immigration and Naturalization Service. However, if released to the custody of this Service at any time before deportation is effected or before other final disposition is made of his case, he may be released under bond in the sum of \$1000.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 2nd day of Aug., 1935.

TURNER W. BATTLE,

CS

Assistant to the Secretary of Labor [27]

Prison No. 57211	California State Prison,
S. F. File No.	San Quentin, California,
	(Date) April 23, 1935.

Report of investigation of status of Sebastian Gabot alias Jack Denny conducted by M. Bertrand Couch at San Quentin, California, on April 23, 1935,

Testimony recorded by M. Bertrand Couch

Examination conducted in the English language
acting as interpreter

Examining Inspector to Sebastian Gabot

Q. You are advised that I am an United States Immigrant Inspector and authorized by law to administer oaths in connection with the enforcement of the immigration law. I desire to take a statement regarding your right to be and remain in the United States. Any statement which you make should be voluntary and you are hereby warned that such a statement may be used against you either in criminal or deportation proceedings. Are you willing to make this statement or answer questions under these conditions?

A. Yes.

Q. Do you swear to tell the truth, the whole truth and nothing but the truth so help you God?

A. I do.

Q. What is your name, sex, age, conjugal status and occupation (if married, give maiden name and birthplace of wife: also names, ages, and places of birth of children and their present addresses).

A. My name is Sebastian Gabot. I am a male, I am 23 years old. I am a house boy. On March 20, 1934, in Tijuana, Mexico, I married Su San Quan, a Chinese girl

who used to work for me in my restaurant in Lompoc, Calif. I took her to Mexico to marry her. We were in Mexico about four hours that day. We came back in the regular way, we were not asked anything, the officers just wavee their hands to us to go on. We separated July 27, 1934, in Lompoc. I don't know her address now. We had no child from our marriage.

Q. Have you ever been known by any other name?

A. Jack Denny.

Q. When and where were you born; of what country are you a citizen or subject; and of what race are you?

A. I was born January 1, 1912, in Binalonan, Pangasinan, P. I. I am a citizen of the Philippine Islands. I am of the Filipino Race.

Q. State the name of your parents, their birthplaces, the countries of which they are citizens or subjects, and present address?

A. My father's name is Anacleto Gabot, and my mother is Marcela Dacuag, both were born in my birthplace and live there now. They are citizens of the Philippine Islands.

Q. Has either parent ever been a citizen or subject of any other country or taken steps to become a citizen or subject of any other country?

A. No.

Q. Has either parent ever resided in the United States?

A. No.

Q. When and where did you last enter the United States?

A. I re-entered March 20, 1934, San Ysidro, California. The officers just waved their hands at me and my

Chinese bride to go on and they asked us no questions at all. [28]

Q. For what purpose did you enter the United States?

A. I was returning to continue my residence here.

Q. Were you accompanied by anyone? If so, state names and addresses of accompanying persons.

A. My young Chinese bride, Su San Quan, was with me. We had been over to the Mexican side of the border to get married that day. She was born in China, in Shanghai, October 13, 1910.

Q. Were you going to join anyone? If so, state names and addresses in detail.

A. No but my stepbrother, Gregorio Sanpayan, lives in Lompoc, Calif. P. O. Box 746.

Q. At the time of your last entry were you duly inspected and admitted by an United States Immigrant inspector?

A. I passed right in front of the officers and they asked no questions, just waved to us to keep on going and we did. That was in the afternoon.

Q. Have you at any time prior to your last entry been inspected and admitted to the United States by Immigration officers?

A. Yes. I left Manila, P. I., on September 9, 1927, on the SS President Grant to Honolulu, Hawaii, where I stayed about two years. Then I came to Frisco on the SS President McKinley, July 11, 1929, as 3rd class passenger.

Q. Have you ever resided in the United States prior to the date of your last entry? If so, when and where?

A. From 1937 until now except for the trip to Mexico.

Q. Have you ever had in your possession an immigration visa issued to you in a foreign country by an American consul?

A. No. I did not need one.

Q. Have you ever been excluded or deported or allowed to take voluntary departure from the United States in lieu of deportation by Immigration authorities?

A. No.

Q. At the time of your last entry were you able to read in any language or dialect?

A. Ilocano dialect and some English also.

Q. What was your last foreign address and how long did you live there?

A. Tijuana, Mexico, for a few hours.

Q. Have you any property or financial resources in the United States, or any baggage or personal effects outside of this prison which you wish the Immigration Service to secure for you if you are deported?

A. My stepbrother, (above named) took all my property and personal effects.

Q. State the names and addresses of your nearest relatives living abroad?

A. My parents (see first page)

Q. Have you ever been supported by public charity or an inmate of any charitable institution at any time?

A. No. [29]

Q. On what charge are you confined in this prison?

A. Murder second degree.

Q. When and where was the crime committed?

A. October 11, 1934, in San Luis Obispo, California, I killed William A. B. Master. I believed he was going to kill me. I think I was protecting my life. I did not intend to kill him. I just wanted to save my own life.

Q. Did you plead guilty or not guilty?

A. Not guilty.

Q. What is the date of your sentence

A. January 28, 1935.

Q. What sentence did you receive?

A. 5 years to life.

Q. Have you ever committed any crime prior to this at any time or in any country?

A. No.

Q. Did you ever serve any other term of imprisonment? If so, state when, where, for what and length of sentence.

A. No.

Q. Did you ever use narcotics prior to your last entry?

A. No.

Q. Have you a passport?

A. No.

Q. Have you a birth certificate or baptismal certificate?

A. No.

Q. Have you any paper or document that will aid in establishing your status as a citizen or subject of Philippine Islands; if so, what is the nature of such paper or document?

A. No but my birth is recorded in Binalonan and my parents live there now. [30]

Q. Have you anything further that you wish to say in your own behalf before this statement is closed?

A. I have nothing more to say now.

Personal Description of Alien:

Height 5' 2" Weight 130 Eyes Brown Hair Black
Face Small-round Nose Short-flat at base Mouth
Regular Complexion Brown

Distinctive Marks:

Small scar between eyes, pit scar.

Sebastian Gabot
(Signature of Alien)

Signed in the presence of

(Signed) M. Bertrand Couch

United States Immigrant Inspector

CRIMINAL HISTORY:

Fingerprint returns show this man has been convicted of only one crime, the one he is now doing time for.

MBC [31]

State of California, County of Marin—ss.

I, the undersigned, Mark E. Noon, do hereby certify that I am the duly appointed, qualified and acting Secretary of the Board of Prison Terms and Paroles of the State of California, and that by virtue of my said office, I am the keeper and official custodian of all the official records and files of said Board.

I further certify that I have carefully compared each document and paper which is hereto attached with the original of which it purports to be a copy, and that the documents which are hereto attached are full, true and correct copies of said originals as the same appear of record in the official records and files of the said Board of Prison Terms and Paroles, which are in my custody and keeping as aforesaid.

I further certify that this attestation is in due form and by the proper officer.

In Witness Whereof, I have subscribed the foregoing and have caused the official seal of my office to be thereunto attached on this the 25th day of April, 1935.

Mark E. Noon

Secretary, Board of Prison Terms and Paroles,
San Quentin, California.

By.....

Assistant Secretary [32]

In the Superior Court of the County of San Luis Obispo
State of California

The People of the State of California,
Plaintiff,

vs.

Jack Denny,

Defendant.

COMMITMENT TO STATE PRISON

P. C. Secs. 1168, 1216

The People of the State of California,

To the Sheriff of the County of San Luis Obispo, and
the Warden and officers in charge of the State Prison of
the State of California, at San Quentin, Greeting:

The above named Jack Denny having been duly convicted in the Superior Court of the County of San Luis Obispo, of the crime of Murder of the Second Degree and judgment having been pronounced against him that he be punished by imprisonment in the State Prison of the State of California at San Quentin for the term pre-

scribed by law all of which appears to us of record, and a certified copy of the judgment being endorsed hereon and made a part hereof:

Now, This Is to Command You, the said Sheriff of the County of San Luis Obispo to take and keep and safely deliver the said Jack Denny into the custody of the said Warden or other officer in charge of the State Prison of the State of California at San Quentin, California at your earliest convenience.

And This Is to Command You, the said Warden and other officers in charge of the State Prison of the State of California at San Quentin, California to receive of and from the Sheriff of the County of San Luis Obispo the said Jack Denny convicted and sentenced as aforesaid, and him the said Jack Denny keep and imprison in the said State Prison of the State of California at San Quentin, California. And these presents shall be your authority for the same. Herein fail not.

Witness, Hon. T. A. Norton, Judge of the Superior Court of the County of San Luis Obispo, State of California, this 29th day of January, 1935.

Attest, my hand and seal of said Superior Court, the day and year last above written.

(Seal)

Gwen Marshall

Clerk

By - - - - -

Deputy Clerk [33]

San Quentin, California,

Date: Mar 27 1935

CRIMINAL HISTORY

As shown by the fingerprint returns from the California State Bureau of Identification and from the Bureau of Investigation, U. S. Department of Justice, Washington, D. C.

San Quentin Name: Denny, Jack.

San Quentin No: 57211.

S. F. File No:

Received at Prison: Jan. 29, 1935.

From: San Luis Obispo.

Court No: 1556.

Crime: Murder. 2nd.

Alias—Sebastian Gavot; Sebastian Gabot;

Country of Birth: Filipino.

Age: 23.

Race: Filipino.

Plea in Court: Pleaded not Guilty.

Occupation: Houseboy.

Date Sentenced: January 28, 1935.

Sentence: 5—life.

Date	Town	Number	Name	Charge	Disposition
10-11-34	S Luis Obispo	Cir 106	Sebastian Gabot	A.D.W.	Wanted

Department of Justice

11-1-34	PD L.A.	31234-M-12	Jack Denny	A.D.W. sus	Not given
11-2-34	SO S. Luis Obispo	A-3173	Jack Denny	Murder	" "

10-11-34, San Luis Obispo, Wanted, *assult* with deadly weapon, Notified 12-22-34.

J.G.G. [34]

In the District Court of the United States in and for the
Southern District of California
Central Division
No. 5458 P.H.

In the Matter of
SEBASTIAN GABOT
for Writ of Habeas Corpus

AFFIDAVIT OF SERVICE BY MAIL

United States of America
Southern District of California—ss.

Ann B. Storler, being first duly sworn, deposes and says:

That (s)he is a citizen of the United States and a resident of Los Angeles County, California; that (~~his~~) (her) business address is 600 Post Office and Court House, Los Angeles, California; that (s)he is over the age of eighteen years, and is not a party to the above-entitled action;

That on June 14, 1946 (s)he deposited in the United States Mails in the Post Office at 312 No. Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Return to Writ of Habeas Corpus addressed to Harry Wolpin and L. A. Gordon, 1026 Black Building, 357 South Hill Street, Los Angeles 13, California, his last known address, at which place there is a delivery service by United States Mails from said post office.

Ann B. Storler

Subscribed and Sworn to before me, this 14 day of June, 1946.

(Seal)

Clerk, U. S. District Court, Southern
District of California,

By E. M. Enstrom, Jr.,

Deputy.

[Endorsed]: Filed Jun. 14, 1946. [35]

[Title of District Court and Cause.]

ANSWER TO RETURN
(Traverse)

Comes now said Sebastian Gabot, petitioner herein, and controverts the return made by said Albert Del Guercio, District Director, Immigration and Naturalization Service, Department of Justice, Los Angeles, California, District No. 16, to the Writ of Habeas Corpus herein, in these particulars, to-wit:

That it was improper for said District Director to merely return that he held petitioner in compliance with a warrant of deportation issued on November 8th, 1935 under the authority then vested in the Secretary of Labor, since said return should have shown what the Department of Labor, through its various boards and officers, had done, and this is only possible when a full record is returned. 1010

Kwock Jan Fat v. White, 253 U. S. 454, 40 S. Ct. 566, 64 L. Ed.

U. S. vs. Commissioner of Immigration (C. C. A. N. Y.), 3 F. 2d 551.

As to the sufficiency of the return see

In re Ah Toy (C. C. N. D. Cal. 1891), 45 Fed. 795

Marslin v. Schmucker, (C. C. A. 4th), 89 F. 2d 765 (1937)

Jung Woon Kay v. Carr (C. C. A. 9th, 1937), 88 F. 2d 297

Munsey v. Clough (1905), 196 U. S. 364, 25 S. Ct. 282, 49 L. Ed. 515

Christy, Comm. of Imm., et al. v. Leong Don, 5
Fed. 2d 135

Crowley v. Christensen (1890), 137 U. S. 86, 11
St. Ct. 13, 34 L. Ed. 620. [36]

Further controverting said return to the Writ of Habeas Corpus petitioner denies, first, that he is being restrained under proper and legal authority; second that as stated in said Warrant of Deportation that he committed a crime involving moral turpitude within five years of entry, the fact of the matter being that petitioner lawfully entered the United States on September 30th, 1927 as shown on form 505, Certificate of Admission of Alien, a true copy of which is hereto annexed and made a part hereof and marked "Exhibit 1" and not on March 20th, 1934 as alleged in said Warrant; third, that it was not possible to deport petitioner prior to June 12th, 1946 due to conditions resulting from the war, the Court being well aware of the fact that shipping was resumed to the Philippine Islands shortly after V-J Day, a matter of some ten months; fourth, that the hearing allegedly accorded the petitioner on September 12th, 1935, was a hearing in good faith, consistent with the fundamental principles of justice, embraced within due process of law; (See *Tang Tun v. Edsell*, 223 U. S. 673, 32 S. Ct. 359, 56 L. Ed. 606); fifth, that a fair investigation into the facts was made by the Immigration Service to determine petitioners right to remain in the United States, the proceedings being conducted in a spirit of inquisition, in which proceedings the examiner was in the attitude of an inquisitor, rather than a judge; sixth, that the findings were based on adequate evidence; seventh, said petitioner further denies generally each and every statement in the return save that he

is restrained of his liberty by the said Albert Del Guercio, District Director, Immigration and Naturalization Service, Department of Justice, Los Angeles, California, District No. 16; eighth, said petitioner further avers, that he is by the said Albert Del Guercio restrained of his liberty in violation of the Fifth Amendment of the Constitution of the United States, and is by said Albert Del Guercio deprived of his liberty without due process of law.

Chin Yow v. U. S., 208 U. S. 8, 28 S. Ct. 210,
52 L. Ed. 369

Zakonaite v. Wolf, 226 U. S. 272, 33 S. Ct. 31, 57
L. Ed. 218

Bilokumsky v. Tod, 263 U. S. 153, 44 S. Ct. 54,
68 L. Ed. 221.

L. A. GORDON AND HARRY WOLPIN

By Harry Wolpin

Attorneys for the Petitioner [37]

[Verified] [38]

EXHIBIT I

Imm. & Natz. Service San Francisco, California

File No. 12020/25089

Form 505

CERTIFICATE OF ADMISSION OF ALIEN

U. S. Department of Labor

Honolulu File 4800-E

Immigration Service

District Director

Port of Honolulu, T. H.

Immigration & Naturalization Service

San Francisco, California

Date 5-13-35

I Hereby Certify that the following is a correct record and statement of facts relative to the admission to the United States of the alien named below:

- (1) Manifest No. 3-16; Class 3rd
- (2) S. S. President Grant; Line Dollar
- (3) Port at which admitted, Honolulu, T. H.; Date 9-30-27
- (4) Name Sebastian Gabot; Age 18; Sex, Male
- (5) Married, No.; Occupation,; Able to read,
Write,
- (6) Citizen of,.....; Race, % % % % %
- (7) Place of Birth, Apr. 8, 1909 Binalonan Pangasinan
- (8) Class of Immigration
visa,; No.; Issued at; Date,
- (9) Last permanent residence,
- (10) Name and complete address of nearest relative or
friend in country whence alien came,
- (11) Destination,; By whom, Money brought,
..... passage paid
- (12) Whether in U. S. before, When,
Where,
- (13) Whether going to relative or friend, Give name
and complete address;
H. S. P. A. Honolulu, T. H.
.....(No answers given to next five questions
re alien)
- (19) Accompanied by.....; How admitted, Primary
- (20) Remarks: Head tax status not shown.

(Signature) /s/ W. G. STRENCH

District Director

(Official Title)

Honolulu District

U. S. Government Printing Office 1933 14-2302

[Endorsed]: Filed Jun. 17, 1946. [39]

[Minutes: Friday, June 21, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This matter coming on for hearing on return of Writ of Habeas Corpus pursuant to order for the issuance thereof filed June 11, 1946; L. A. Gordon and Harry Wolpin, Esqs., appearing as counsel for the petitioner; Robert E. Wright, Assistant U. S. Attorney, appearing as counsel for the Government; Bruce Barber, Esq., Immigration Dep't, being present; and the petitioner being present:

Attorney Wolpin makes a statement that the petitioner is exempt from deportation pursuant to the Tydings McDuffy Act exempting Filipinos from deportation for the violation of law, either criminal or civil.

Attorney Gordon makes a statement in support of petition. Attorney Barber makes a statement in opposition to petitioner's claim. Attorney Wright makes a statement.

Sebastian Gabot, petitioner, is called, sworn, and testifies in his own behalf. The Court, after due consideration of the evidence, oral and documentary, and the points and authorities in support, and the law applicable, orders the petition granted and the defendant discharged from custody; counsel for the petitioner to prepare formal order of release.

On motion of Attorney Barber, who requests that the defendant be held in custody pending the decision of the Attorney General on the question of appeal, it is ordered on stipulation of counsel that the defendant may be released on \$1,000 bond pending signing of formal order in accordance with the Court's ruling. [40]

[Minutes: Tuesday, July 2, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming before the Court *ex parte*; L. A. Gordon, Esq., appearing for the petitioner, and Robert Wright, Esq., Asst. U. S. Atty., appearing for the Government, and in behalf of the Immigration and Naturalization Service, interposing no objections to the Findings of Fact & Conclusions of Law now before the Court, and having approved same, the Court signs the Findings of Fact and Conclusions of Law and Order discharging petitioner from custody of the Immigration and Naturalization Service of the United States and that bond of \$1000.00 cash on deposit herein be exonerated. The Court further orders said Findings filed and Order filed and entered in the Civil Order Book. [41]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly to be heard on the 17th day of June, 1946 and thereafter was continued by the Court to the 21st day of June, 1946, L. A. Gordon and Harry Wolpin, appearing for the petitioner and Ronald Walker and Bruce Barber, appearing for the respondent; and evidence both oral and documentary having been introduced and the cause submitted for decision, the Court now makes its findings of fact as follows:

Findings of Fact

I.

That it is true that the petitioner was born in Vinalamon, Philippine Islands on April 8th, 1909 and was admitted for permanent residence to the United States at Honolulu, Territory of Hawaii on September 30th, 1927 and to the territorial United States at San Francisco, California on July 29th, 1929 and has resided in the United States continuously since then.

II.

That it is true that petitioner went to Tia Juana, Mexico on the 20th day of March, 1934, returning to the United States through San Ysidro four hours later. [42]

III.

That it is true that on or about October 11th, 1934 petitioner was arrested for the commission of a crime involving moral turpitude, to-wit, Second Degree murder of which he was duly convicted before the Superior Court at San Luis Obispo, California, and sentenced to imprisonment for a term of one year and more.

IV.

That it is true that while serving a term of imprisonment for said crime at San Quentin Prison and on or about the 23rd day of April, 1935, petitioner was interviewed by an official of the Immigration and Naturalization Service, who informed him that if petitioner would not oppose steps taken by the government to effect his deportation, that he would be deported within one year. [Hall]

V.

That it is true that on September 12th, 1935, at San Quentin Prison, one M. Bertrand Couch, a U. S. Immigrant Inspector granted petitioner a hearing during which petitioner was advised concerning his right to be represented by counsel of his own selection, and that petitioner refused to be so represented.

VI.

That it is true that petitioner was not released from imprisonment until he had completed the full period set by the Board of Prison Terms and Paroles.

VII.

That it is true that petitioner was not released from prison until May 22nd, 1942. That it is likewise true that petitioner surrendered into the custody of Albert Del Guercio, District Director of Immigration and Naturalization Service, Department of Justice, Los Angeles, California by virtue of an outstanding warrant of Deportation issued on November 8th, 1935 by the Secretary of Labor.

VIII.

That it is true that petitioner was not being held by virtue of any complaint, indictment, presentment, warrant, rule, regulation or order, except as set out in Paragraph VII of the Findings of Fact hereinabove set forth.

[43]

Conclusions of Law

And as conclusions of law from the foregoing facts, the Court finds:

I.

That the petitioner was born a National of the United States. That the various hearings before the Immigration and Naturalization Service did not deprive petitioner of due process of law.

II.

That on May 1st, 1934, petitioner was a Citizen of the Philippine Islands.

III.

That by virtue of the provisions of Section 172.9 of the Rules and Regulations of the Immigration and Naturalization Service (C. F. R. 903) which provides that any Citizen of the Philippine Islands which (who) was residing in the United States on May 1st, 1934 shall not be deported for any act which occurred prior to May 1st, 1934, petitioner was not subject to deportation.

IV.

That said petitioner is entitled to be discharged from the custody of the Immigration and Naturalization Service. Judgment is hereby ordered to be entered accordingly.

Dated: July 2nd, 1946.

PEIRSON M. HALL

Judge of the U. S. District Court

[Endorsed]: Filed Jul. 2, 1946. [44]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 5458 P-H

In the Matter of the Application of
SEBASTIAN GABOT
for a Writ of Habeas Corpus

ORDER

To Albert Del Guercio, District Director, Immigration
and Naturalization Service, Department of Justice,
Los Angeles, California, District 16:

It appearing on the return of the Writ of Habeas Corpus allowed by this Court on the 17th day of June, 1946 and thereafter continued by this Court to the 21st day of June, 1946 that Sebastian Gabot is illegally detained by you in that said Sebastian Gabot was born a National of the United States and that on May 1, 1934 he was a Citizen of the Philippine Islands, and by virtue of the provisions of Section 172.9 of the Rules and Regulation of the Naturalization and Immigration Service he could not be deported for any act which occurred prior to May 1, 1934, and that said Sebastian Gabot was not subject to deportation.

It Is Therefore Ordered that pursuant to the Findings of Fact and Conclusions of Law heretofore made herein and by reason of the facts and the law pertaining hereto said Sebastian Gabot [45] shall be forthwith discharged

from the custody of the Immigration and Naturalization Service of the United States.

It Is So Ordered.

Dated this 2nd day of July, 1946.

PEIRSON M. HALL

Judge of the U. S. District Court

Judgment entered Jul. 2, 1946. Docketed Jul. 2, 1946.
C. O. Book 39, page 89. Edmund L. Smith, Clerk; by
J. M. Horn, Deputy.

[Endorsed]: Filed Jul. 2, 1946. [46]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Albert Del Guercio, District Director, Immigration and Naturalization Service, Department of Justice, District No. 16, respondent herein, hereby appeals to the Circuit Court of Appeals for the 9th Circuit from the final judgment entered in this action on July 2, 1946.

Dated: July 2, 1946.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

Attorneys for Respondent

[Endorsed]: Filed & mld. copy to L. A. Gordon & Harry Wolpin, attys. for petnr. Jul 3, 1946. [47]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD
AND DOCKET APPEAL

Upon motion of respondent (appellant), good cause appearing therefor,

It Is Ordered that the time within which the record on appeal of this cause may be filed with the Circuit Court of Appeals for the 9th Circuit, and the cause there docketed, be extended to and including October 1, 1946.

Dated: This 26th day of July, 1946.

PEIRSON M. HALL

Judge, United States District Court

[Endorsed]: Filed Jul. 26, 1946. [48]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 49 inclusive contain full, true and correct copies of Petition for Writ of Habeas Corpus; Order for Writ of Habeas Corpus; Writ of Habeas Corpus; Return to Writ of Habeas Corpus; Answer to Return (Traverse); Minute Orders Entered June 21, 1946 and July 2, 1946; Findings of Fact and Conclusions of Law; Order; Notice of Appeal; Order Extending Time to File Record and Docket Appeal and Stipulation Designating Record on Appeal which, together with copy of Reporter's Transcript of Hearing on June 21, 1946, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 23 day of September, A. D. 1946.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause.]

Honorable Peirson M. Hall, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, June 21, 1946

Appearances:

For the Petitioner: L. A. Gordon, Esq., 1026 Black Building, Los Angeles 13, California; and Harry Wolpin, Esq., 1026 Black Building, Los Angeles 13, California.

For the Respondent: Charles H. Carr, United States Attorney, Los Angeles 12, California; by Robert E. Wright, Esq., Assistant United States Attorney; and Bruce G. Barber, District Adjudications Officer United States Immigration and Naturalization Service.

Los Angeles, California; June 21, 1946; 10:00 o'clock A. M.

The Court: Ex parte matters?

The Clerk: Yes, your Honor.

(Other court matters.)

The Clerk: No. 5458, Civil; in the matter of Sebastian Gabot.

Mr. Wolpin: That is ready, your Honor.

Mr. Wright: Ready.

The Court: I examined the briefs and memoranda filed by the parties and I think it is clear, as a matter of law, that date of reentry concerning which there is no question of fact was March 20, 1934.

Mr. Wolpin: We concede that, but we should like to call your Honor's attention to the fact that the Tydings-McDuffy Act that went into effect on May 1, 1934, subsequent to this reentry, provided that hereafter the Filipinos

shall be aliens as far as immigration is concerned. Prior to that time, your Honor, they were regarded as nationals for the purpose of going and coming from the United States. I submit, your Honor, that when the petitioner entered the United States from Tia Juana on March 24, 1934, that that was not the reentry of an alien as far as the law was concerned.

I think counsel will agree to that.

Mr. Wright: No. [2*]

The Court: Let me see. Your point then is that this defendant is completely exempt.

Mr. Wolpin: That is correct.

The Court: From deportation for any cause?

Mr. Wolpin: That is correct, your Honor.

The Court: Your point further is that the Tydings-McDuffy Act, which was passed subsequent to March 20, 1934, applied only to Filipinos who entered the United States after that date?

Mr. Wolpin: That is what the law says, your Honor. The law says that as far as Filipinos are concerned they shall be regarded as aliens on and after May 1, 1934, in their entry to the United States. So there was no entry of an alien, your Honor, as provided by that act when he returned to the United States on March 24, 1934.

The Court: March 20th.

Mr. Wolpin: March 20, 1934.

The Court: Do you have the text of that act?

Mr. Wolpin: I believe counsel has it.

Mr. Wright: 48 U. S. C., 1238.

The Court: Where does it say there that citizens of the Philippine Islands are citizens of the United States?

Mr. Wolpin: That is not my contention, your Honor.

*Page number appearing at top of page of original Reporter's Transcript.

The Court: That they were United States nationals before this date? [3]

Mr. Wolpin: That is correct, your Honor.

The Court: Where do I find that?

Mr. Wolpin: The fact that citizens of the Philippine Islands are born subsequent to 1899 are United States nationals? Counsel will concede that.

The Court: Will you?

Mr. Barber: No, your Honor. They never were citizens.

Mr. Wolpin: I say they were United States nationals. That is the question his Honor is asking.

Mr. Barber: Oh, yes. We concede that. No question about that.

The Court: But this act doesn't use the phrase or distinction "United States national." I was under the impression that when they rewrote the nationality act in 1940 that they omitted the use of the word "citizens" and referred to everybody as "nationals," but they didn't change the immigration laws.

Mr. Barber: Your Honor, I think you will find that in Section 901 of the nationality act, in which they define nationals and nationals do not include aliens. The term "alien" is expressly excluded from the term "national." And if you will look at Title 8, Section 801 I believe is the section, that gives the definition of a national.

The Court: Does that apply to the immigration laws as well as the nationality laws? [4]

Mr. Barber: Yes, your Honor.

The Court: Let me read this aloud, counsel, so I can perhaps follow you better.

"For the purposes of Chapter 6 of Title 8"—that is the Immigration Act of 1917 and 1924—"this sec-

tion and all other laws of the United States relating to immigration, exclusion or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States, shall be considered as if they were aliens.”

That is to say, that from and after May 1st, the effective date of this act, they were then to be considered as aliens.

Mr. Barber: That is my contention, your Honor.

The Court: So the question is whether or not this petitioner here was a citizen of the United States.

Mr. Barber: The question is, your Honor—if I may state it—whether or not he was an alien under the immigration laws who entered the United States in 1934 on March 20th.

The Court: That is the ultimate question, but we are reducing it down now to—

Mr. Barber: We don't claim he is a citizen of the United States now or ever has been, your Honor.

The Court: Well, it says they were to be considered as [5] is they were aliens.

Mr. Barber: He has always been a national, and for immigration purposes nationals have always been in the category of citizens as far as entry and reentry is concerned, once they reach the United States. And when he went to Tia Juana for four hours and came back to the United States I claim, your Honor, that that was not the entry of an alien under the immigration laws.

Mr. Gordon: Your Honor, I think I can clarify it. I am Mr. Gordon and I am co-counsel with Mr. Wolpin.

The Court: I think Mr. Wolpin is doing pretty well.

Mr. Gordon: Yes, your Honor, but I want to say I am familiar with that and I think Mr. Barber knows it,

that at the time the Tydings-McDuffy Act was passed I was in Washington, and I will say this, that at that time, your Honor, the question as to whether the Filipinos who are in this country, and coming to this country, whether they should retain the privilege of coming in here freely as nationals or not was discussed in the Tydings-McDuffy Act, and subsequently they agreed that after May 1, 1934, the Filipinos who entered the United States would be considered then for the purposes of the immigration only as aliens. That was in Title 8, Subsection 3 of the Tydings-McDuffy Act.

Now previous to that, your Honor—and I believe Mr. Barber will agree with me—they came here with impunity, [5] freely. They came back and forth. In fact, many of them were recruited by different labor organizations here to work all over the Pacific Coast and in Hawaii. The Hawaiian sugar planters brought them in in droves.

Now our contention is that Sebastian Gabot went into Tia Juana for four hours to get married. This was previous to May 1, 1934. When he went to Tia Juana he was still a national, he was still clothed with the rights, we may say, of almost a citizen of the United States.

The Court: If that is the case, if that is your contention, then you do not concede, as I understand the concession to be, that the date of his entry was March 20, 1934. You concede, as a matter of fact, that he did go across the border and did come back, but you also assert that he had the right to do that.

Mr. Wolpin: That is correct, your Honor.

The Court: As a United States national.

Mr. Wolpin: That is correct.

If your Honor will read my answer to their supplemental points and authorities, I say counsel concedes the

law to be as stated by the respondent in his supplemental points and authorities. Concerning the subsequent entry of an alien to the United States, we must remember though that the petitioner is a United States national. He has always been a United States national. [6]

In other words, I tried to bring out the fact that all these cases referred to by counsel, they weren't referring to nationals of the United States, they were referring to aliens.

As far as aliens are concerned, your Honor, counsel's contention is exactly correct. But on March 20, 1934, our petitioner was a national of the United States for all purposes, for purposes of entry and reentry, and he cannot come within the category that counsel for the respondent claims these cases apply to.

The Court: I see your point, which was not clear to me in reading your memorandum. The only effect then of the Tydings-McDuffy Act was, after May 1, 1934, to change the status of Filipinos who thereafter entered, or Filipinos who were in the United States and not citizens of the United States.

Mr. Wolpin: There is one more thing I would like to call to your Honor's attention, if I may. In my supplemental brief of points and authorities that was served on counsel before 10:00 o'clock yesterday and filed this morning, I called the attention of the Court to the immigration rules and regulations of the United States which have the same force and effect as law.

The Court: Yes, I have that. I do not see how it is applicable here though.

Mr. Wolpin: It says: "A citizen of the Philippine [7] Islands who has resided in the United States continuously since April 30, 1934 shall not be subject to

deportation for any act of his that occurred or mental or physical diseases, disability, or defect that existed prior to May 1, 1934."

The Court: Your point is not that that applies to the murder which was not committed after May 1st—

Mr. Wolpin: No, that is not my point.

The Court: Your point is that that act is his entry.

Mr. Wolpin: We waive all defects as to entry and reentry. In other words, if they were here on April 30, 1934, if they were residing here, their residence was legal for all purposes and we cannot go back of that date and say that someone entered illegally or in March of 1934.

The Court: Very well. I see your point. Let me hear from the Government.

Mr. Barber: I would like to call the Court's attention to the language of the Supreme Court in *U. S. ex rel. Claussen v. Day*, 279 U. S. 398.

The Court: Is that in your memorandum?

Mr. Barber: Yes.

"It is immaterial whether he was entitled to admission or whether he lawfully entered."

That is speaking of these deportations based upon a crime committed after entry. The statute under which deportation is sought in this case, is that a crime was committed [8] after entry. Now these Filipinos were not citizens, they were aliens.

The Court: They were nationals.

Mr. Barber: They were nationals.

The Court: Is counsel correct in his statement that as a United States national they had the right of entry and reentry the same as a citizen?

Mr. Barber: The immigration laws were not made applicable to them.

The Court: At that time?

Mr. Barber: That is right.

The Court: So that his entry on March 20, 1934, was a lawful entry?

Mr. Barber: Yes. That makes no difference whether it was lawful or unlawful; he entered as an alien at that time.

The Court: Wait a minute. It makes no difference whether it was lawful or unlawful if he entered as an alien?

Mr. Barber: He couldn't have entered as a citizen because he was not a citizen.

The Court: He couldn't have entered as an alien if he was a national.

Mr. Barber: Let me read the term national.

The Court: All right.

Mr. Barber: That is in Section 501 of Title 8, your Honor. [9]

"The term 'national' means a person owing permanent allegiance to a state. The term 'national of the United States' means a citizen of the United States or a person who, though not a citizen of the United States, holds permanent allegiance to the United States. It does not include an alien."

I think the contention of counsel here is that Congress doesn't have the authority to make an immigration act retroactive. That is actually what he is saying.

The Court: No, I don't think he is. He is saying that Congress did not make it retroactive. He is saying that by the Miller-Tydings Act and by the regulation here that they did not make it retroactive.

Mr. Barber: Then the ground for deportation is those things that occurred after the passage of the act. That

murder occurred on October 11, 1934, and the conviction occurred after that date, which was after the act. That is the basis for the deportation and not his entry. His entry may have been lawful. Conceding that he was an alien, the laws applied to him. The basis for the deportation is that he violated his liberty after he came here and that is why he is being deported, not because of his entry.

The Court: Then a person can be a national of the United States and be an alien also?

Mr. Barber: I think that is correct. [10]

The Court: Give me some illustrations. I do not readily follow you.

Mr. Barber: The Filipinos is one illustration. I think there are others.

Mr. Gordon: Following the Government's contention there, your Honor, that one can both be an alien and a national, that is contrary to Section 501 of Title 8. It says "The term 'national of the United States' means a citizen of the United States or a person who, though not a citizen of the United States, owes allegiance to the United States. It does not include an alien."

That is clear. If it does not include an alien then Gabot is not an alien. And up to July 4th of this year, when the Philippines becomes free and an independent nation, your Honor, he is still clothed with the rights of a national. He is not an alien. The Tydings-McDuffy Act has the effect of complete severance or relationship between the United States and the Philippines on July 4th of this year. It will not be long now. But up to that time all the Filipinos are nationals.

Mr. Barber: I think this should be viewed from the standpoint of the law. The law doesn't say he must be

an alien at the time of entry, he must be an alien at the commission of the crime, and I think clearly we can show that.

Mr. Gordon: Our contention is up to now that he is not [11] an alien. He says he must be an alien at the time of the commission of the crime. It is our contention that up to now, up to July 4th, Gabot is a national of the United States and never has been an alien.

It was under that same reasoning that the alien land-lord law of the State of California was not held to be applicable to the Filipinos of California on the ground that they were not aliens.

The Court: This act says: "For the purpose of the immigration act, this section and all other laws of the United States relating to immigration * * * citizens of the Philippine Islands, who are not citizens of the United States, shall be considered as if they were aliens." That means no matter where they are. Doesn't that change your status from nationals to aliens?

Mr. Gordon: Apparently not.

Mr. Wolpin: The law says this man became a national, your Honor, at birth, entered the United States as a national of the United States, at Honolulu in 1927 as a national, came to the mainland in '29 as a national, has lived here ever since, entered the United States prior to May 1, 1934, as a national. In the statement that he gave he said the immigration officers just waved to me and I waved back and went in. That clearly shows that they regarded him as a national, and he has always been a national and never has been an alien. [12]

The Court: Didn't this act make him an alien?

Mr. Wolpin: No, your Honor. He is not an alien.

The Court: Why didn't this make him an alien, because it says "all Filipinos who are not citizens shall be aliens"?

Mr. Wolpin: For the purpose of immigration only.

The Court: For the purposes of the immigration act.

Mr. Wolpin: That is right, your Honor.

The Court: And the immigration act includes the purposes of the expulsion act, doesn't it?

Mr. Gordon: That is true. We concede that. But the question is this, your Honor: When does he step from being a national into becoming an alien? When does the transition take place?

The Court: On and after May 1, 1934.

Mr. Gordon: For the purposes of immigration. But he was in this country legally as a national. A crime was committed later on, we will say, but he was still a national. If he were a citizen, if he were clothed with the rights of a citizen—say he was born a citizen—clearly they can't deport him. But he is a national. He was born in the Philippines.

Now the Government's contention is that they deport him for an act that was committed later on. First they started it on the ground that he had entered into the United States and that that entry was not legal because he was an alien. Now they concede that he is no longer an alien, he is a na- [13] tional. Now if his entry there was legal—

The Court: No, the Government doesn't concede he is a national. He maintains he was an alien from and after May 1, 1934.

Mr. Barber: That is correct, your Honor. I don't think there is any question about that.

Mr. Gordon: Now the Toyota case and the de la Ysla case, your Honor, will settle that, that they are nationals for all intents and purposes. In the de la Ysla case the Supreme Court held that he was a national of the United States.

Mr. Barber: Do I understand counsel's argument to be that Congress doesn't have the power to make Filipinos aliens for immigration purposes?

The Court: I don't think he means that. He means that the Immigration Act of 1917 and the Immigration Act of 1924 can only apply to persons who thereafter entered.

Mr. Gordon: That is right.

The Court: If I understand your position.

Mr. Gordon: That is correct.

The Court: In other words, that this definition here in the Miller-McDuffy Act says "For the purposes of the Immigration Act of 1917 and of 1924 this section and all other laws relating to immigration * * *."

Mr. Gordon: That is true. Suppose they came in later.

The Court: It looks to me that the exclusion provisions [14] and expulsion provisions of those laws made them from and after that date an alien and took away their cloak as a United States national.

Mr. Wolpin: Let us assume, your Honor, that the petitioner prevailed in establishing his defense of self-defense in the murder trial and was not convicted. Would counsel say that he was an alien? Was it the conviction of the crime that made him an alien?

The Court: No, I think counsel maintains he was an alien anyhow. Isn't that right?

Mr. Barber: That is right.

The Court: But he was not subject to deportation until he committed the crime.

Mr. Barber: I am trying to find, your Honor, where in the regulations it is provided that Filipinos who enter prior to May 1, 1934, are to be regarded as having entered lawfully under the immigration laws, giving to the act a retroactive effect.

Mr. Wolpin: There is something else that may help the Court, your Honor. The Government claims that they have the right to deport an alien who committed a crime involving moral turpitude within five years after entry. It is our contention, your Honor, that the entry in this case was in 1927, as shown by our exhibit attached to our answer to their traverse, and there was no entry from the standpoint of immigra- [15] tion purposes within five years of the commission of the crime.

Mr. Barber: Your Honor, these aliens were regarded as having lawfully entered as aliens. I haven't been able to put my finger on the regulation yet, but I think that is well familiar to Mr. Wolpin, who was formerly in our service, that they were regarded as having lawfully entered in the United States under the immigration laws where they came to the United States prior to the passage of the act of May 1, 1934.

Mr. Wolpin: As aliens, Mr. Barber.

Mr. Barber: The law must have related to them as aliens. They could apply for a reentry permit on the basis of that entry if they showed residence in the United States prior to May 1, 1934.

Mr. Wolpin: That is true, but the Tydings-McDuffy Act, our contention is, was not retroactive in order to make the petitioner an alien at the time of his entry on

March 20, 1934. He entered without inspection, counsel will concede.

The Court: Your contention is that all these cases cited by the Government were aliens?

Mr. Wolpin: That is correct.

The Court: You concede that he was not an alien before May 1, 1934, the effective date of the Tydings-McDuffy Act, but that he was a United States national?

Mr. Barber: He was a national. I have never been able to see the difference. As a national he is not a citizen, [16] and never has been. There is a distinction, and it is very difficult to draw, between a national and a citizen.

The Court: If he is not a citizen he is an alien?

Mr. Barber: I think he is an alien if he is not a citizen.

The Court: You mean he was.

Mr. Barber: Yes.

The Court: At all times he was.

Mr. Barber: Yes. As a class of alien they might have provided any type of alien might enter without inspection, like Canadians can go across the border without inspection.

The Court: But they are not nationals.

Mr. Barber: No, they are not nationals.

The Court: Rule 31 of the Immigration Rules and Regulations, Subdivision (d)—I do not find any Rule 31 in this book that some of you gentlemen sent up to me.

Mr. Barber: That is the rules and regulations of January 1, 1930, and they are not in Title 8 of the Federal regulations.

The Court: This book is entitled "Immigration and naturalization Laws and Regulations as of March 1, 1944." What rule was it?

Mr. Barber: The one cited by Mr. Wolpin is Rule 31 of the Immigration Rules and Regulations, Subdivision (d), and these appear to begin with Rule 105. [17]

Mr. Wolpin: I have the text here if your Honor wishes to see it.

The Court: I cannot find it in this book. Maybe you can find it.

Mr. Barber: I have that rule, I think.

The Court: I want to find it in my book so that when I want to look for it again I can find it.

Mr. Barber: It is Title 8, Code of Federal Regulations.

The Court: Where is it in that book?

Mr. Barber: The section he is referring to, I believe, is Section 172.9, which I can read here.

The Court: Just a minute. If that is another section, I can find it. 172.9?

Mr. Barber: Yes, your Honor.

Mr. Wright: Page 903 of your book, your Honor.

The Court: I find it now but I could not find it under this reference number.

Mr. Barber: I would like to call the attention of the Court to the wording of this provision that Mr. Wolpin refers to.

You will note in there that it doesn't refer to the criminal classes, it merely says: "A citizen of the Philippine Islands who has resided in the United States continuously since April 30, 1934 shall not be subject to deportation for any act of his that occurred or mental or physical dis- [18] eases, disability or defect that existed prior to May 1, 1934." It doesn't refer to the criminal classes which are made deportable.

The Court: If he committed a crime that would have been an act of his, but that does not make any difference

with relation to that because the crime was committed subsequent to May 1, 1934. His point with relation to this is that while it was his act of May 1, 1934, it is the concurrence of that act, together with his reentry on May 20, 1934, the two acts together make him deportable.

Now there isn't any doubt but what his reentry in Tia Juana was an act, is there? It was an act of his. It was something he did.

Mr. Barber: It was an act but he wasn't in the United States, he was coming into the United States.

Mr. Wright: It is more than an act, your Honor.

The Court: It was an act of his that occurred, and his reentry occurred before May 1, 1934, and conceding that it was either legal or illegal it does not make any difference under this provision whether it was legal or illegal if it was an act that subjected him to deportation. He couldn't be subjected to deportation for the act which occurred subsequent to May 1, 1934, unless it is taken in conjunction with the act which occurred on March 20, 1934.

Mr. Barber: I think, your Honor, that this act clearly [19] is retroactive, otherwise I don't see how, after they were made aliens by that act, you could regard their entry occurring prior to May 1, 1934, as having been a lawful entry as an alien for naturalization purposes and for immigration purposes.

The Court: I do not think it makes any difference if their construction of this is correct whether his entry was lawful or unlawful, or whether he was a national or not a national, or a citizen. He was a citizen of the Philippine Islands. There isn't any doubt about that, is there?

Mr. Gordon: No.

I think Mr. Barber is trying to make much of an issue as to whether or not the act is retroactive. Now Rule 31, Subdivision (d), states—

The Court: That is Rule 172.9.

Mr. Gordon: It says right in there, your Honor.

“All citizens of the Philippine Islands shall be subject to deportation and may be deported in the same manner as aliens, with the following exceptions:

“(1) A citizen of the Philippine Islands who has resided in the United States continuously since April 31, 1934 shall not be subject to deportation for any act of his that occurred or mental or physical diseases, disability or defect that existed, prior to May 1, 1934.” [20]

In effect they give effect to it that it is not retroactive.

Mr. Barber: Your Honor, this refers to residents in the United States, it looks to me like, and this act was one that was outside of the United States. He went out of the United States to come back in.

The Court: He came back in.

Mr. Barber: Yes, he did.

Mr. Gordon: He was here on April 30th though.

The Court: I have the de la Ysla case here. Let me see what it says.

Mr. Wright: Your Honor, if you are stopping for a moment, I have been reflecting on a remark the Court made as to the effect of this entry prior to April 30, 1934, as being an act which, taken in conjunction with the crime, the criminal act, is the basis for the deportation. I think, your Honor, that the only effect of that act of entry in March of 1934 is to fix a point at which starts the beginning of the statutory period, and it has no other effect than that.

The Court: I do not think there is any doubt about that, but it still is his act which occurred before May 1, 1934.

Mr. Wright: Yes. It is his act, and that is the reason for my remark that the characterization of it as being his act is not a sufficiently comprehensive characterization to place it in the picture that we are considering. Notwithstanding it is his act, it is his act of entry and its only legal effect, so far as this question is concerned, is to fix the period, that is, the beginning of the period within which he is subject to deportation by violating his right to remain here by the commission of this crime.

In other words, the position that I am presenting to your Honor is that we do not have here a situation where two acts must be taken conjunctively to constitute the cause for deportation. The first act, the act of reentry, fixes the beginning of the period within which the act which is the cause for the deportation must occur, and that of course occurred within five years.

Mr. Gordon: I don't think that is a tangible viewpoint. In other words, for the purposes of the Government that they fix a date as to his reentry into his country. All right. It says clearly here that he is not accountable for anything that occurred after that, and yet they want to base his rights to be deported from that date.

The Court: Let me glance at this case. What is the provision of the statutory reference under which you are deporting him?

Mr. Barber: Title 8, Section 155, right at the beginning; Section 155(a).

The Court: He must have been an alien when he re-entered, must he not? [22]

Mr. Barber: I don't see that it says that.

The Court: It says:

“At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this chapter, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; * * * any alien who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, * * *

Mr. Wright: May I suggest another emphasis for that alien business, your Honor? It doesn't say any person who at the time of entry was an alien; it says any time within [23] five years after entry any alien, and since April 30, 1934, this man has been considered as an alien so far as this law is concerned.

The Court: This *de la Ysla* case is pretty definite in its statement that the citizens of the Philippine Islands are not aliens, and while this related to the application of this man to become a citizen of the United States on the ground that he had—

Mr. Wright: That case is prior to the amendment of May 1st, your Honor.

The Court: No, this is 1935, May 20, 1935, and—

Mr. Barber: You will notice the Supreme Court said the same thing prior to 1934.

The Court: Yes, this is based upon the Toyota case.

Mr. Barber: It doesn't say they are citizens.

The Court: I know, but it doesn't say they are aliens. They must be an alien to be able to be deported.

Mr. Barber: In connection with what Mr. Wright has said here, I think the basis of the deportation must be the commission of the crime. Take, for instance, an alien who had been lawfully admitted, he could not be deported unless he committed the crime. If he commits the crime involving moral turpitude within five years he may be deported. The deportation is really based upon the commission of the crime which violates the liberty he has here by the illegal entry. [24]

Mr. Wright: At the time this man committed this crime he was an alien, so at any time within five years after entry any alien who at the time of entry, etc. It refers to this particular man because when he committed the crime he was to be considered as an alien pursuant to the provisions of the statute as it existed after April 30, 1934.

Mr. Gordon: But the *de la Ysla* case came later after the commission of this crime, and they held that he was a national.

Mr. Wright: He was a national, yes, but for the purpose of the deportation law he is to be considered as an alien.

Mr. Gordon: For the purpose of the immigration law, counsel. That is an immigration question.

The Court: On these questions, do you have any evidence to offer in this case? These are questions of law.

Mr. Wolpin: They are all questions of law, your Honor.

The Court: You have no evidence?

Mr. Wolpin: Not on the question of the law; no.

The Court: On any question, do you have any evidence to offer at all?

Mr. Wolpin: If your Honor rules with us I do not think it is necessary to offer any evidence. If your Honor rules against us, if your Honor rules he was an alien when he entered, which I don't see how by any stretch of the imagination it could be determined that way, then we might have some evi- [25] dence from the petitioner.

The Court: I think you had better put your evidence on because I want to give a little consideration to these cases here.

Mr. Wright: We don't present the question that he was an alien when he entered and we don't want to have anything to do with that question. We will just say that he is to be considered as an alien when he committed this crime as far as the law is concerned.

Mr. Wolpin: Does your Honor wish to hear the question of whether he had a fair hearing?

The Court: Whatever evidence you have to offer, I will hear.

Mr. Wolpin: Will you take the stand, Mr. Gabot?

SEBASTIAN GABOT,

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Sebastian Gabot.

The Clerk: Your address?

The Witness: 704 West Main Street, Santa Maria, California.

The Clerk: Take the stand. [26]

Direct Examination

By Mr. Wolpin:

Q. Mr. Gabot, where and when were you born?

A. In Binalonan, Philippine Islands.

Q. When were you born, Mr. Gabot?

A. What date?

Q. What date.

The Court: Pardon me, counsel. None of these things are denied.

Mr. Wolpin: No, they are not denied. As far as that is concerned, the entire matter, by failing to deny the allegations in their answer they have admitted them.

The Court: Of course you had some conclusions in your application here. That he consented to deportation under duress is, in effect, your conclusion. That he would be deported from the United States anyway, and if he would sign a consent, that the inspector would get him out of prison and send him to the Philippine Islands within a year. Those are the only things that are denied.

Mr. Wolpin: I do not believe that they are even denied, your Honor, in the return to the writ.

(Testimony of Sebastian Gabot)

Mr. Barber: Your Honor, the reason they are not denied is under the authority of the Ninth Circuit in 88 Fed. (2d) 297, at page 298, it states:

"In a habeas corpus case the issues are framed [27] upon a return and denial without reference to the petition or the writ."

Then in the case of *United States v. Jewell*, Second Circuit, 266 Fed. 651, the Court states:

"The allegations of the traverse were put in issue without reply by the return."

The Court: I think that is the rule. So that is the only thing that is in issue here, is the question of whether or not he had a fair hearing, isn't that right?

Mr. Wright: Yes, your Honor.

The Court: The matter of the date of entry, reentry, commission of the crime, incarceration in the penitentiary, conviction, release date, those are all admitted.

Mr. Wright: A copy of the report of the hearing is attached to the return in this case as well.

Mr. Wolpin: Very well.

Q. Will you tell the Court, Mr. Gabot, what happened when you were in San Quentin Prison as far as the immigration service is concerned?

A. Well, I can't recall it but they asked you over there because when they come and ask you you are always—they always say "Sign this," "Sign this" and "Sign this," and you can't refuse anything. You have to sign it, or you have to give your statement, regardless if you like it or not.

(Testimony of Sebastian Gabot)

Q. Tell the Court what happened before you gave this [28] statement on April 23, 1935. Do you remember meeting M. Bertrand Couch, an immigration official?

A. It has been a long time that I can't remember everything.

Q. Do you remember what they told you before you gave this statement?

A. Well, they say if I will be willing to be deported to the Philippines within a year, I have to give a paper to sign, and after that I will be deported within a year.

Q. Were you deported within a year?

A. No, sir.

Q. How long after they told you you would be deported within a year if you signed this statement were you actually released from prison?

A. Well, they tell me I will be deported within a year and I have been out from San Quentin for four years.

Q. How long were you in San Quentin after April 23, 1935?

A. I have been there about seven and a half years.

Q. Six and a half years after they told you you would be deported within a year after you signed this statement?

A. Yes, sir.

Q. And if they didn't tell you that you would be deported within a year would you have waived your right to counsel? [29]

A. Well, I would have refused then to be deported, if they will not let me out within a year.

Mr. Wolpin: Is there anything the Court wishes to ask?

The Court: Maybe counsel wants to cross-examine him.

(Testimony of Sebastian Gabot)

Mr. Wright: No cross-examination.

Mr. Wolpin: That is all, your Honor.

The Court: I would like to ask you some questions.

You said you signed some document. What document? You didn't develop that. I don't know what you are talking about.

By Mr. Wolpin:

Q. Did you sign a consent to deportation, Mr. Gabot, in April of 1935?

A. I did sign it to provide that I will be deported within a year.

Q. With the understanding that you would be deported within a year? A. Yes, sir.

Q. And after that they conducted this hearing in which they asked you some questions about where you were born, and so forth, and you told them everything?

A. Yes, sir.

Q. And you told them that you didn't care to have an attorney present, that that was the understanding, that you would be deported within a year?

A. Yes, sir. [30]

Q. Approximately six months later they came again for another statement, didn't they?

A. Well, I think about that time.

Q. That was in September? A. Yes.

Q. And at that time what did they tell you about your being deported?

A. Well, they tell me the same thing as they told me the first time.

(Testimony of Sebastian Gabot)

Q. Did you say, "I want to be sent back to my home in the Philippine Islands as quickly as they will let me be deported? I am all ready to go. I have nothing to get outside of this prison in the way of property and personal effects," is that what you said? A. Yes.

The Court: Was that true?

The Witness: Yes, sir.

The Court: Was that your state of mind at the time?

The Witness: Yes.

The Court: You were willing to be deported?

The Witness: I was willing then if within a year.

The Court: If they deported you within a year?

The Witness: Yes.

The Court: That was because you were in prison then?

The Witness: Yes. [31]

The Court: For several years?

The Witness: Yes.

By Mr. Wolpin:

Q. You are not willing to be deported now, are you?

A. No.

Mr. Wolpin: That is all, your Honor.

The Court: Cross-examine.

Mr. Wright: No cross-examination, your Honor.

The Court: Was there any statement that you made to the immigration officers on either of these occasions which was not true?

The Witness: No.

The Court: Very well.

(Witness excused.)

Mr. Wolpin: I wish to call your Honor's attention to the end of the statement taken April 23, 1935. First I want to call your Honor's attention to that statement in that nowhere in that statement do they ask him if he wishes to be represented by counsel.

Then I wish to call your Honor's attention to the end of that statement which says, "Criminal history." It says:

"Fingerprint returns show this man has been convicted of only one crime, the one he is now doing time for."

This man, your Honor, is not a man of criminal tendencies. [32] I don't care to go further into the question of his innocence or guilt. That has been determined. It is *res adjudicata* as far as we are concerned. But if your Honor will read that statement—

The Court: I don't think there is any prejudice coming to him by virtue of the statement. There wasn't any question that he answered untruthfully, and even though he had been represented by counsel we don't know what other answers he would or could have given. He was already convicted of the felony and the fact that he admitted it neither gave him any greater nor less right in any connection whatsoever. They asked him about nothing else. It was solely in connection with that. So they did not secure information from him at that time which they are now trying to use against him and which wasn't almost a matter of public record. So I do not think you will be entitled to your writ on the basis of a lack of a fair hearing.

The only question in my mind is a question of law, as to whether or not, as a matter of law, he can or cannot

be deported. I want to read the Toyota case again. I think you have all given me the references that are required here.

Do you have any other statutory or regulatory reference?

Mr. Wolpin: Does your Honor wish to have us file briefs?

The Court: I do not think so. I think there is enough here. It may be that I can examine this a little more right [33] now, if you will just wait a minute. I will read the Toyota case again.

Mr. Wright: Will your Honor be about five minutes? Maybe we can have a short recess.

(Short recess.)

The Court: I think I am ready to make a decision in the matter.

As I indicated, I do not think there is any substance to the petitioner's claim that he was denied a fair hearing, and the question remains as to whether or not, as a matter of law, the deportation provisions of the immigration and exclusion laws apply.

Under the authority of the Toyota case, *Toyota v. U. S.*, 268 U. S. 402, and particularly at page 412, and the Ninth Circuit case of *Roque de la Ysla v. U. S.*, decided by the Ninth Circuit on May 20, 1935, reported in 77 Fed. (2d) at 988, a certiorari denied, 296 U. S. 575, the Court there holds that citizens of the Philippine Islands are not aliens. So that on the date of his reentry into the United States, concerning which there is no dispute, on March 20, 1934, he was not an alien and he was a citizen of the Philippine Islands at that time and still is and has been at all times a citizen of the Philippine Islands.

The exclusion and deportation laws of Title 8, Section 155, and particularly the subdivision under which this depor- [34] tation order is brought, having committed a crime within five years after entry, relates to aliens, so that up until May 1, 1934, the effective date of the Tydings-McDuffy Act, the petitioner here was not an alien.

Whether he was an alien after that time or still is an alien, I do not think is material because under the provisions of the Tydings-McDuffy Act it might appear that he would be classified as an alien because it provides that for the purposes of the immigration and naturalization laws of this section, and all other laws relating to immigration, exclusion and expulsion of alien citizens of the Philippine Islands who are not citizens of the United States, shall be considered as if they were aliens. The department having to do with the enforcement of that statute promulgated a regulation which has the force and effect of law, if it is within the power given, and no point is made that it is not within the power given so it must be considered a law. That regulation provides as follows:

"All citizens of the Philippine Islands shall be subject to deportation and may be deported in the same manner as aliens, with the following exceptions:

"(1) A citizen of the Philippine Islands who has resided in the United States continuously since April 30, 1934, shall not be subject to deportation [35] for any act of his that occurred or mental or physical diseases, disability, or defect that existed, prior to May 1, 1934."

There isn't any question here of any mental or physical diseases, disability or defect. There is no question here

but that the petitioner has resided in the United States continuously since April 30, 1934. So the question to be decided and the question on which the case turns is whether or not any act of his, that is to say, he committed any act prior to May 1, 1934, which makes him subject to deportation.

There isn't any dispute but what the assault with a deadly weapon, or murder—which was it?

Mr. Wolpin: Second degree murder.

The Court: —second degree murder, for which he was convicted and sentenced to serve a term in the California prison, was committed on October 11, 1934, which was after May 1, 1934.

There isn't any doubt but what that was within the five-year period subsequent to his reentry on March 20, 1934; and there isn't any doubt but what it is far beyond the five-year period subsequent to his original and only previous entry into the United States in September 1927. So the question gets narrowed down still further to whether or not his reentry on March 20, 1934, was an act of his which occurred prior to May 1, 1934, which might subject him to deportation. [36]

I do not think that his reentry alone would. But it is very plain also that the commission of the offense involving moral turpitude on October 11, 1934, alone would not have subjected him to deportation, had it not been for his act of voluntarily leaving the United States and returning on March 20, 1934, which he had a right to do, and which he did at a time when he was an alien. I think it was an act within the terms and provisions of this regulation which occurred prior to May 1, 1934.

Therefore it took the concurrence of the two acts of the petitioner here, namely, the commission of the offense after May 1, 1934, which, as I say, could not under any circumstances have subjected him to deportation had it not been for his previous act of voluntarily leaving the United States and returning on March 20, 1934, which was prior to May 1, 1934, and I think therefore that under the regulations as promulgated by the department in their construction of the law, and enforcement of the law, as well as the various acts involved, that the petitioner is entitled to his writ, which will be granted.

The petitioner will be discharged from custody.

Mr. Wolpin: Thank you, your Honor.

Mr. Barber: Would the Court consider withholding judgment to give the Government time to see whether or not the Attorney General will authorize an appeal? Otherwise the [37] alien will go without custody.

Mr. Gordon: Your Honor, he has been held for quite a long time now.

Mr. Barber: There is no bond now.

The Court: Has he been out on bond?

Mr. Wolpin: No, your Honor.

The Court: Is he in custody now?

Mr. Wolpin: Yes. He has been in the county jail sleeping on the floor without a cot or without a cover.

The Court: Do you have any reason to believe that the defendant here will disappear? It is quite evident that he will not go back to the Philippine Islands.

Mr. Barber: No. It is quite a difficult problem to find these persons when they do decide to disappear within the United States.

The Court: I think that the question of law is a novel one. It appears not to have been decided by any of the

courts except this one, and I think that in the interests of the administration of the laws, that the Attorney General certainly should be given an opportunity to determine whether or not he wants to appeal the case.

Mr. Gordon: Suppose we do this: We will make arrangements with Mr. Barber any time he wants our client we will be glad to produce him. Mr. Barber has known me long enough.

Mr. Wolpin: May I suggest that a reasonable bail be [38] fixed, something like \$500?

The Court: I do not know whether I can fix bail because I am granting the writ and discharging the petitioner from custody.

Mr. Barber: If you withhold your order you could give the Government an opportunity to consider bail and release him under bail pending the time the Attorney General will take an appeal.

The Court: The defendant will remain in custody until the signing of a formal order.

Now on this matter, I notice recently that the Circuit Court on a writ of habeas corpus sent it back to the trial court for findings of fact. I hadn't been familiar with their desire to have findings of fact in such matters, so I do not know whether you want to prepare findings of fact or not.

Mr. Wright: I can't get it into my head that it was the intention of Congress, or the Supreme Court, that

these rules should apply to habeas corpus matters in view of the constitutional and statutory provisions relating to habeas corpus generally.

The Court: What rules?

Mr. Wright: The rules of civil procedure with reference to findings of fact and conclusions of law.

The Court: All of us have our own ideas about whether the Circuit Court is right or wrong, but they are the Circuit [39] Court, and it is our duty and obligation to follow them. Had I been deciding many of the things they decide I no doubt would have decided them differently, and so would you. But nevertheless I do not think that it is necessary to have findings of fact and conclusions of law on such a matter.

I have indicated here in the statement which I have attempted to make my appraisal of the facts and my conclusions of law, and it seems to me that that should be sufficient for the Appellate Court to ascertain the grounds upon which I granted the application.

I think the Attorney General is entitled to reasonable time, and the petitioner will remain in custody until the signing of the formal order which the parties will prepare and present.

Mr. Barber: We will do that immediately by telegraph.

The Court: Would you know today, because I will be in Fresno all next week.

Mr. Barber: I don't think it would be necessary to know today. They undoubtedly want to know on what basis the matter is before the court.

The Court: I will withhold signing the order then until July 1st, Monday. That will be one week from Monday.

Mr. Gordon: Will he remain in custody?

The Court: He will remain in custody and I will withhold signing the formal order releasing him until that time, [40] unless in the meantime the parties consent to release him on bond, in which event you can take it to one of the judges here during my absence and they of course can release him on bond.

Mr. Wolpin: We are willing to post a bond of \$500 so he doesn't have to remain incarcerated in view of the circumstances in the county jail where he has been sleeping on the bare floor for the past five days.

Mr. Barber: We can remove him back to Terminal Island. That is where we had him.

Mr. Gordon: On the other hand, he wants to be discharged and we are willing to put up a bond.

The Court: The parties have heard the order and ruling of the Court.

(After a subsequent hearing in chambers, the Court ordered, on stipulation of counsel, that the petitioner may be released on \$1000 bond pending the signing of the formal order in accordance with the Court's ruling.) [41]

CERTIFICATE.

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 12th day of September, A. D., 1946.

AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed Sep. 13, 1946. [42]

[Endorsed]: No. 11433. United States Circuit Court of Appeals for the Ninth Circuit. Albert Del Guercio, District Director Immigration and Naturalization Service, Department of Justice, District No. 16, Appellant, vs. Sebastian Gabot, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed September 24, 1946.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11433

ALBERT DEL GUERCIO, District Director Immigration
and Naturalization Service, Department of Justice,
District No. 16,

Appellant,

vs.

SEBASTIAN GABOT,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD FOR
CONSIDERATION ON APPEAL

Pursuant to Paragraph 6, of Rule 19 of the Rules of
this Court, Appellant states the points on which he
intends to rely on the appeal, as follows:

1. The District Court erred in its interpretation and construction of the scope, intent, and purpose of the regulation 8 C. F. R. 172.9 (a), more particularly the meaning of the words "any act of his" contained therein.
2. The regulation so interpreted and construed is void as making an exception or limitation not authorized by the Act of Congress which became effective May 1, 1934 (48 Stat. 456, 462, 463; 53 Stat. 1230; 48 U. S. C. 1232, 1238) making the Immigration Acts of 1917 and 1924 applicable to Filipinos; more specifically because the regulation, thus interpreted,

would be inconsistent with the language of Section 19 (a) of the Immigration Act of 1917 (8 U. S. C. 155) here involved.

3. The Court erred in discharging petitioner.

Appellant designates the entire record on appeal as the record necessary for the consideration thereof.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

ROBERT E. WRIGHT

Attorneys for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 24, 1946. Paul P. O'Brien,
Clerk.

No. 11433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT DEL GUERCIO, District Director Immigration and
Naturalization Service, Department of Justice, District
No. 16,

Appellant,

vs.

SEBASTIAN GABOT,

Appellee.

APPELLANT'S BRIEF.

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FILED

DEC - 4 1946

PAUL P. O'BRIEN

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No. 11433

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALBERT DEL GUERCIO, District Director Immigration and
Naturalization Service, Department of Justice, District
No. 16,

Appellant,

vs.

SEBASTIAN GABOT,

Appellee.

APPELLANT'S BRIEF.

Jurisdiction.

The United States District Court for the Southern District of California had jurisdiction of the writ of habeas corpus proceeding under Section 752, R. S., February 13, 1925, c. 229, Section 6, 43 Stat. 940 (28 U. S. C. 452). The appellee was being held in the custody of the appellant in the County of Los Angeles, State of California, within the jurisdiction of the District Court. This Court has jurisdiction of the appeal under Section 463(a) of Title 28 U. S. C.

Statutes and Regulations Involved.

Section 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 889 (8 U. S. C. 155(a)) provides, *inter alia* (Deportation of Undesirable Aliens):

“* * * any alien who is hereafter sentenced to imprisonment for a term of one year or more because of a conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States * * *”

The Philippine Independence Act (Act approved Mar. 24, 1934, Public Law 127, 73d Congress), provides:

“(1) For the purposes of Chapter 6 of Title 8 (except Sec. 213 c.) this section and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands, who are not citizens of the United States, shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of 50. * * * (48 U. S. C. Section 1238).”

Pursuant to authority conferred upon the then Secretary of Labor, a regulation designated General Order 209, dated June 8, 1934, was promulgated. (8 Code of Federal Regulations Part 172.)

Section 172.9 of the Regulation provides:

“All citizens of the Philippine Islands shall be subject to deportation and may be deported in the same manner, as aliens, with the following exceptions:

(a) A citizen of the Philippine Islands who has resided in the United States continuously since April 30, 1934, shall not be subject to deportation for any

act of his that occurred, or mental or physical disease, disability, or defect that existed prior to May 1, 1934;

* * *¹

Statement of the Case.

Petition for writ of habeas corpus was filed in the United States District Court for the Southern District of California, Central Division, on June 11, 1946 [R. 2 to 5, 9]. On the same date order was entered awarding the writ of habeas corpus [R. 9, 10]. Return to the writ was filed on June 14, 1946 [R. 11 to 36]. Traverse was thereafter filed on June 17, 1946 [R. 37 to 40]. On June 17, 1946 and June 21, 1946, the matter was heard by the court [R. 41, 50 to 83].

The district judge granted the writ on June 21, 1946 but upon motion of the Government withheld discharging the appellee, pending signing and filing of the formal order [R. 42], and released appellee on court bond. On July 2, 1946 the court signed and ordered filed findings of fact and conclusions of law and ordered appellee discharged from the custody of appellant and exonerated the court bond [R. 42 to 47]. Formal notice of appeal was filed with the District Court on July 3, 1946 [R. 47]. On July 26, 1946 order extending time to file record and docket appeal to October 1, 1946 was approved and filed with the court [R. 48].

¹Effective July 4, 1946, Part 172 of Title 8, Code of Federal Regulations, was revoked in its entirety but contained the saving clause: "Provided, that revocation shall not affect any proceedings or parts of proceedings which take place prior to July 4, 1946," and a new Part 172 assigned, effective the same date, under the title "Immigration, exclusion and deportation of Filipinos under the provisions of the Philippine Rehabilitation Act of 1946 and the Philippine Trade Act of 1946." (See: 11 Federal Register 7127 of June 27, 1946.)

Summary of Facts.

The appellee is a native and citizen of the Philippine Islands, of the Filipino race [R. 28]. He arrived in the Territory of Hawaii on September 9, 1927, where he continued to reside until arrival upon the mainland of the United States on July 11, 1929 [R. 29]. Appellee never thereafter left continental United States except to make a trip to Tijuana, Mexico to be married on March 20, 1934, returning to the United States the same day [R. 28, 29,² 43].

On October 11, 1934, at San Luis Obispo, California, appellee killed one William A. B. Master [R. 30], and was on January 28, 1935, upon a plea of Not Guilty, convicted of the crime of Second Degree Murder and sentenced to serve five years to life in the California State Prison at San Quentin [R. 31, 33 to 35, 43].

On April 23, 1935 sworn statement was accepted from the appellee by an officer of the Immigration and Naturalization Service at San Quentin Prison [R. 27 to 35, 43, 71 to 75] and warrant of arrest issued on August 2, 1935 by the Secretary of Labor [R. 23, 25, 26, 44], and appellee was thereafter, on September 12, 1935, accorded a hearing under the warrant of arrest in deportation proceedings [R. 22 to 26, 44]. On November 8, 1935 warrant directing

²The figures "1937" appearing in the answer in the last line, bottom of page 29 of the transcript of record, is an error in printing as the original exhibit attached to appellant's return shows the year to have been recorded as "1927" instead of "1937."

the deportation of the appellee to the Philippine Islands upon his release from imprisonment was issued [R. 20, 21, 44]. The appellee was not released from imprisonment until May 22, 1942 [R. 44].

Appellee had been surrendered into the custody of the appellant for deportation to the Philippine Islands on June 12, 1946 when the writ of habeas corpus proceedings were instituted [R. 9, 11, 12].

Questions at Issue.

1. Did the District Court err in holding that the re-entry of appellee into the United States from Mexico on March 20, 1934 was "an act of his" precluding deportation within the meaning of the regulation set forth in Section 172.9(a), Title 8 Code of Federal Regulations, *supra*?

2. Is the said regulation as interpreted and construed by the District Court void in that so construed it makes an additional exception or limitation not authorized by the Act of Congress contained in Section 8 of the Philippine Independence Act, declaring the Immigration Acts of 1917 and 1924 applicable to Filipinos, and as being inconsistent with the language of Section 19(a) of the Immigration Act of February 5, 1917, here involved?

ARGUMENT.

While it may have no material bearing on the questions at issue in this appeal, we do not find that citizens of the Philippine Islands have ever been declared by Congress to be citizens of the United States. It is necessary that a person occupying such status naturalize to become a citizen of the United States.³

Following the ratification of the Treaty of Paris on April 11, 1899 ceding the Philippine Islands to the United States, they owed no allegiance to any foreign government. They owed allegiance to the United States. It was therefore said that they were not aliens.⁴

For certain purposes citizens of the Philippine Islands have, however, been declared to be aliens.⁵

On and after May 1, 1934 citizens of the Philippine Islands were declared by Act of Congress to be aliens for the purposes of the Immigration Acts of 1917 and 1924.⁶

³*In re Bautista*, 245 F. (2d) 765, 771.

⁴*Toyota v. United States*, 45 S. Ct. 563, 565, 268 U. S. 402, 411, 69 L. Ed. 1016.

⁵*Ganey v. United States*, 8 Cir., 149 F. (2d) 788.

⁶Section 8, Philippine Independence Act, *supra*.

I.

“Entry” Not a Part of Deportable Ground.

The District Court concludes that the applicable deportation statute⁷ requires a concurrence of the conviction for the specified crime and entry of the alien *as an alien*, and reasons that since appellee at the time of entry into the United States from Mexico, on March 20, 1934, had not yet been declared an alien for immigration purposes, one element required by the deportation statute was lacking [R. 79, 80].

Appellant contends that deportation is directed by Congress not because of the “entry”, but rather by reason of conviction of and sentence for the indicated crime. “Entry” merely fixes the date from which the five-year limitation period runs. An analogous situation is present in the case of an alien who is lawfully admitted for permanent residence. He may remain in the United States indefinitely if he is not convicted of crime. If he is convicted of such crime, “it is immaterial whether he was entitled to admission or whether he lawfully entered” the United States.⁸ “It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States, * * * in-

⁷8 U. S. C. A. 155(a) “* * * any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, * * *.”

⁸*Claussen v. Day*, 49 S. Ct. 354, 279 U. S. 398, 400, 73 L. Ed. 758.

cludes authority to *impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend*"⁹ (emphasis added). If the "act of his" for which appellee is *subject to deportation* is the "conviction of crime" and not "entry", then he clearly is not being subjected to deportation for his act of entering the United States on *March 20, 1934*, within the meaning of the regulation in question.¹⁰ True, his entry into the United States on *March 20, 1934* was an "act of his", but it is not an "act of his" which is a ground for deportation under either the 1924 or 1917 Immigration Acts. The act of the appellee which subjected him to deportation was his commission of crime followed by conviction and sentence therefor. The regulation exempts from deportation only where the "act of his" is the basis for the deportation and it occurs prior to *May 1, 1934*. The offense of second degree murder was committed on *October 11, 1934*. Appellee had been sentenced on *January 28, 1935*. These latter events occurred at a time when by Section 8 of the Philippine Independence Act, appellee was declared by Congress to be an alien for the purposes of the Immigration Acts of 1917 and 1924. The date of his commission of the crime, on *October 11, 1934*, with its resulting conviction and sentence, was when the "act of his" occurred which constituted the basis for deportation, and not his act of entering the United States on *March 20, 1934*. His "act" of reentry is no part of the ground for deportation.

⁹*Zakenaite v. Wolf*, 33 S. Ct. 31, 226 U. S. 272, 57 L. Ed. 218.

¹⁰Section 172.9, Title 8, Code of Federal Regulations, *supra*.

An example of an "act of his" occurring prior to May 1, 1934 and which would come within a deportable ground within the meaning of the regulation exempting from deportation might be stated in the case of a Filipino who subsequent to the effective date of the 1917 Immigration Act and prior to May 1, 1934 had been convicted and sentenced to a year or more on more than one occasion "* * * because of conviction in this country of any crime involving moral turpitude, committed at any time after entry." This would be a deportable ground under the 1917 Act, but because it occurred prior to May 1, 1934 the regulation directs that deportation not be undertaken.

The Government contends further that the language of the applicable portion of Section 19(a) of the Immigration Act of February 5, 1917 (8 U. S. C. 155(a)), does not require the construction given by the court below to the effect that the five-year statutory period of limitation runs only from the reentry into the United States of the appellee *as an alien*. The statute refers first to "any alien who is hereafter sentenced." Appellee was for immigration purposes an alien when he was sentenced on January 28, 1935 [R. 35]. The statute then refers to the crime "* * * committed within five years after entry of the alien to the United States." The words "the alien" relate back to "any alien * * * sentenced", recited in the first portion of the provision. It should not, therefore, be construed as if it were meant to read "committed within five years after entry of the alien *as an alien*", which would appear to be the effect of the construction arrived at by the District Court. The literal construction of the applicable language of the 1917 Act here contended for is consistent

with prior decisions of the courts arising under that Act, and also with the purposes and intent of the Philippine Independence Act. The latter act provides in part that,

“* * * for the purposes of the Immigration Act of 1917 * * * citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens.”¹¹

Congress therefore required that the Immigration Act of 1917 be applied with the same force and effect to the persons indicated in the quoted language as applied to aliens generally. In this connection it is significant to observe that the Second Circuit Court of Appeals in construing that portion of Section 19(a) of the 1917 Act, *supra*, here involved, stated:

“We think that the intention of Congress was plain to make an alien of the class to which the appellant belongs, subject to apprehension and deportation whenever found, even though his entry into the country was prior to the effective date of the Alien Immigration Act of 1917.”¹²

Again, the Second Circuit Court of Appeals in construing other deportation provisions of the 1917 Act, *supra*, applicable to an alien who was a professional beggar and who entered the United States in 1913 and an alien who entered in 1914 and subsequently became a public charge by reason of insanity, held that the provisions of the 1917

¹¹Section 8, Philippine Independence Act.

¹²*Lauria v. United States*, 271 Fed. 261; cert. den. 42 S. Ct. 48, 257 U. S. 635, 66 L. Ed. 408.

Act are retroactive, adopting an earlier decision of this Honorable Court to the same effect.¹³

While it is true that the cases last above referred to involved persons who were aliens at the time of entry, the mere fact that such person entered prior to the effective date of the 1917 Act was not held to bar deportation for causes subsequently arising. The fact that appellee was a national at the time of his last entry on March 20, 1934 should not make inapplicable the principle of these cases to the issues herein raised.

II.

The Regulation Is Void if It Must Be Construed as Interpreted by the District Court in That Under Such Construction It Constitutes a Limitation on the Application of the Immigration Acts, Not Authorized by Section 8 of the Philippine Independence Act, Supra.

But for the one express exception, Congress has declared that the 1917 and 1924 Immigration Acts shall be applicable to the Philippine citizens therein specified in the same manner as those laws are applied to aliens generally. The pertinent language of Section 8 of the Philippine Independence Act, reads:

“For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except Section 13(c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens.”

¹³*U. S. ex rel. David v. Todd, etc.*, 2d Cir., 289 Fed. 60, referring to *Akira Ono v. U. S.*, 9th Cir., 267 Fed. 359.

If it be conceded, as here contended, that the fact constituting the ground for appellee's deportation is the commission of the offense and subsequent conviction and sentence for the crime of second degree murder after May, 1, 1934, then the 1917 Immigration Act is applicable to the appellee without any exception or limitation. It would therefore follow that the regulation as interpreted by the lower court places a limitation on the application of the 1917 Immigration Act not authorized by the Philippine Independence Act which expressly declares that the 1917 and 1924 Immigration Acts are to have the same application to the newly designated class of aliens as to all other aliens, with the one exception of Section 13(c) of the 1924 Act. (8 U. S. C. 213(c).)

Moreover, if the deportable ground includes as one of its elements "entry as an alien", as was in effect concluded by the District Court, such construction of the regulation renders partially inapplicable the involved deportation clause of Section 19(a) of the 1917 Act, thereby nullifying completely that portion of the deportation clause relating to the commission, conviction and sentence for crime.

Since Congress expressly states that the 1917 and 1924 Immigration Acts are to be applied to Philippine citizens in the same manner as to other aliens, but for the exception of Section 13(c) of the 1924 Act, it is only logical to conclude that Congress meant that no other exception should be made in applying these laws to Philippine citizens. This conclusion has support in the long established

rule of statutory construction that where a statute declares that all its provisions are applicable and enumerates a particular exception, the expression of the exception implies an intent to exclude all other exceptions.¹⁴

Conclusion.

The involved regulation obviously does not preclude deportation for any "act of his" (appellee's) that occurred prior to May 1, 1934, but only where the "act of his" occurring prior to that date would, but for the date of its occurrence, constitute a basis for deportation within the purview of the provisions of the deportation laws contained in the Immigration Acts of 1917 and 1924. We contend that the act of appellee which constituted an act cognizable under the deportation law as a ground for expulsion was not his entry into the United States from Mexico on March 20, 1934, but rather his act of committing the offense of second degree murder for which he was convicted and sentenced to imprisonment for the term of more than one year, all of which latter events occurred after May 1, 1934; that the time of entry merely indicates the date from which the running of the statutory period of limitation is measured. Further, that the charge upon which appellee's deportation is directed under Section 19(a) of the 1917 Immigration Act, *supra*, is not required to be construed as if it read "committed within five years after

¹⁴*Continental Casualty Company v. U. S.*, 62 S. Ct. 393, 396, 314 U. S. 527, 533, 86 L. Ed. 426. See also *Knapp-Monarch Company v. Commissioner of Internal Revenue*, 139 F. (2d) 863, 864.

the entry of the alien to the United States *as an alien.*" Congress has at no time conferred United States citizenship upon citizens of the Philippine Islands, and appellee has never acquired the legal status of a United States citizen.

The lower court's interpretation of the regulation renders it void, in that it would constitute a limitation on the application of the Immigration Acts of 1917 and 1924 not authorized by Congress under Section 8 of the Philippine Independence Act. From the wording of the latter act it is clear that the only limitation contemplated by Congress was with respect to Section 13(c) of the 1924 Immigration Act. The interpretation of the District Court, the commission of the offense, conviction.

Respectfully submitted,

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No. 11433

IN THE

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ALBERT DEL GUERCIO, District Director Immigration and
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Appellant,

vs.

SEBASTIAN GABOT,

Appellee.

APPELLEE'S BRIEF.

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FILED

JAN 25 1947

PAUL P. O'BRIEN,

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No. 11433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT DEL GUERCIO, District Director Immigration and
Naturalization Service, Department of Justice, Dis-
trict No. 16,

Appellant,

vs.

SEBASTIAN GABOT,

Appellee.

APPELLEE'S BRIEF.

Appellant in his opening brief has cited and quoted from many cases laying down broad principles of law concerning the authority conferred by Congress upon the Immigration Service to deport "any alien who is hereafter sentenced to imprisonment for a term of one year or more because of a conviction of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . ." With none of these cases or principles so propounded does the appellee quarrel. It is the appellee's position that the instant case does not present facts bringing it within any of the precedents cited by the appellant. This is so obvious that no attempt will be made to deal with each case cited, but the appellee will confine his attack upon the appellant's brief to the one or two cases relied upon by the appellant which seem at all relevant, and to such of the appellant's argument as appears reasonably colorable.

Statement of the Case.

This is an appeal from an order of the United States District Court made and entered on the 21st day of June, 1946, granting a Writ of Habeas Corpus and discharging the appellee from custody. The appellee, who is a native and citizen of the Philippine Islands, had been taken into custody on April 16, 1946 for deportation, and was about to be transported to San Francisco, California, for embarkation when the Writ of Habeas Corpus proceedings were instituted, on June 11, 1946.

The undisputed facts of this case are that appellee was lawfully admitted to the Territory of Hawaii on September 9, 1927 and to the mainland of the United States on July 11, 1929. That he thereafter never left the continental United States except to make a trip to Tiajuana, Mexico, on March 20, 1934, returning four hours later through San Ysidro, California. [Tr. p. 43.] That on October 11, 1934 at San Luis Obispo, California, appellee killed one William A. B. Master and was on the 28th day of January, 1935, upon a plea of Not Guilty, convicted of the crime of Second Degree Murder and sentenced to serve five years to life in the California State Prison at San Quentin. That appellee was released from imprisonment on May 22, 1942.

Questions at Issue.

1. Did the District Court err in holding that the re-entry of appellee into the United States from Mexico on March 20, 1934 was "an act of his" precluding deportation within the meaning of the regulation set forth in Section 172.9(a), Title 8, Code of Federal Regulations?
2. Is said regulation a valid exercise by the Immigration and Naturalization Service of the duty imposed upon

it to make reasonable rules and regulations necessary to carry out the provisions of the Acts of Congress relating to immigration?

3. Was the re-entry of the appellee on the 20th day of March, 1934, an entry within the express provisions of the Immigration Act of 1924?

Section 172.9 of the Code of Federal Regulations provides as follows:

“All citizens of the Philippine Islands shall be subject to deportation and may be deported in the same manner, as aliens, with the following exceptions: (a) A citizen of the Philippine Islands who has resided in the United States continuously since April 30, 1934, shall not be subject to deportation for any act of his that occurred, or mental or physical defect that existed prior to May 1, 1934”

Since citizens of the Philippine Islands were exempt from the provisions of the Immigration and Naturalization Laws of the United States prior to the passage of the Tydings-McDuffy Act, no accurate record was kept of their entry or departure from the continental United States. It was for that reason determined that all Philippine citizens who resided in the United States continuously since April 30, 1934 should be presumed to have entered lawfully, just as it is presumed that all aliens who can prove that they resided in the United States since prior to June 30, 1906, are presumed to have entered lawfully and need no Certificate of Arrival in order to naturalize. (39 Stat. 874, 897 (1917); 8 U. S. C. Sec. 173 (1926).)

I.

The District Court Did Not Err in Holding That the Re-Entry of Appellee Into the United States From Mexico on March 20, 1934, Was an "Act of His" Precluding Deportation.

In determining that the appellee was entitled to his Writ of Habeas Corpus the Hon. Peirson Hall, Judge of the U. S. District Court said [Tr. pp. 78-80]:

"There is no question here but that the petitioner has resided in the United States continuously since April 30, 1934. So the question to be decided and the question on which the case turns is whether or not any act of his, that is to say, he committed any act prior to May 1, 1934, which makes him subject to deportation.

"There isn't any dispute but what the assault with a deadly weapon, or murder—which was it?

"Mr. Wolpin: Second Degree Murder.

"The Court: —second degree murder, for which he was convicted and sentenced to serve a term in the California prison, was committed on October 11, 1934, which was after May 1, 1934.

"There isn't any doubt but what that was within the five-year period subsequent to his re-entry on March 20, 1934; and there isn't any doubt but what it is far beyond the five-year period subsequent to his original and only previous entry into the United States in September, 1927. So the question gets narrowed down still further to whether or not his re-

entry on March 20, 1934, was an act of his which occurred prior to May 1, 1934, which might subject him to deportation.

"I do not think that his re-entry alone would. But it is very plain also that the commission of the offense involving moral turpitude on October 11, 1934, alone would not have subjected him to deportation, had it not been for his act of voluntarily leaving the United States and returning on March 20, 1934, which he had a right to do, and which he did at a time when he was not an alien. I think it was an act within the terms and provisions of this regulation which occurred prior to May 1, 1934.

"Therefore, it took the concurrence of the two acts of the petitioner here, namely, the commission of the offense after May 1, 1934, which as I say, could not under any circumstances have subjected him to deportation had it not been for his previous act of voluntarily leaving the United States and returning on March 20, 1934, which was prior to May 1, 1934, and I think that under the regulations as promulgated by the department in their construction of the law, and enforcement of the law, as well as the various acts involved, that the petitioner is entitled to his writ, which will be granted."

Of course, it has always been, and it still is, the contention of the appellee that the offense committed by appellee was not committed within five years after entry, which point will be discussed and authority therefore cited in Point III.

II.

Said Regulation Is a Valid Exercise by the Immigration and Naturalization Service of the Duty Imposed Upon It to Make Reasonable Rules and Regulations Necessary to Carry Out the Provisions of the Acts of Congress Relating to Immigration.

Section 23 of 39 Stat. 892 provides as follows:

“That the Commissioner General of Immigration shall . . . establish such rules and regulations . . . as he shall deem best for carrying out the provisions of this Act.” (8 U. S. C. 102.)

It is too well settled to require the citation of authorities that the rules and regulations of the Immigration and Naturalization Service have the force and effect of law. (*Cf. Fok Yung Yo v. United States*, 185 U. S. 296, 303, 22 S. Ct. 686, 46 L. Ed. 917.)

This Court, in the case of *Chun Shee v. Nagle*, 9 F. (2d) 342 at page 343, said:

“Section 23 of the same act (Barnes Code, Sec. 3726, 39 Stat. 892; Comp. St. Ann. Supp. 1919; Sec. 4289¼o) is as follows: The duties of the Commissioners of Immigration and other immigration officials in charge of districts, ports or stations shall be of an administrative character, to be prescribed in detail by regulations prepared under the direction or with the approval of the Secretary of Labor.

“Pursuant to this authority regulations have been promulgated with the approval of the Secretary of Labor, defining the procedure in deportation hearings. It is conceded that these regulations have the force of law.” Citing cases.

The Circuit Court of Appeals for the Third Circuit in the case of *Sibray v. United States*, 282 Fed. 795, in sustaining the action of the District Court in awarding the Writ of Habeas Corpus in a case in which the Immigration Service disregarded the Rules and Regulations of the Immigration and Naturalization Service, said at page 797:

“ . . . the contention is made that under certain circumstances it is discretionary with the inspector as to whether or not he will disregard the rules of the department, made pursuant to the authority of the statute. We are unable to subscribe to this proposition . . . If the appellant's position prevails, the administration of this statute will be according to the caprice of men, and not according to the fixed requirement of law. Aliens must be deported according to law, and not according to men. This statute must be administered according to its terms and the rules established by the Commissioner General of Immigration. Those charged with the enforcement are not at liberty in any particular case, and for reasons that may appeal to them at the moment to set aside any one of the rules on which the rights of the alien depend. . . . Congress, in its wisdom has enacted a statute, under the provisions of which, in accordance with the rules established by the Commissioner General of Immigration, certain aliens may be deported, and every alien charged with crime has the right to rely upon the observance of the statute and those rules by those charged with their enforcement in a proceeding to deport him”

.

III.

Was the Re-Entry of the Appellee on March 20, 1934
an Entry Within the Express Provisions of the
Immigration Act of 1924?

In the instant case, unlike all the cases referred to in his brief by the appellant, we have a United States National who went to Mexico for a period of four hours for the express purpose of getting married, returning by way of San Ysidro. Not being an alien, can we say that he made a re-entry under the provisions of the Immigration Act of 1924?

In the case of *Annello ex rel. Annello v. Ward, Commissioner*, 8 Fed. Supp. 797 at page 798, District Judge Brewster said:

“The decision of the immigration authorities seems to be based . . . on the fact that he crossed Canadian territory in driving from Boston to Detroit, and back. As to the latter ground, obviously the Department disregarded the express provisions of the Immigration Act of 1924 (Act May 26, 1924, c. 190, Sec. 203 (4)), which defines an ‘immigrant’ to be one who departs from a place outside of the United States destined for the United States except’ (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory.”

“The alien, having been lawfully admitted, was not subject to deportation unless his practically uninterrupted journey from Detroit to Windsor and back constituted an entry within the meaning of the immigration laws. Admittedly, the last entry rather than the original entry is to be considered in computing

the time within which the crime must have been committed.” (Citing cases) . . .

“In my opinion it is carrying the application of the doctrine of the above cases too far to regard as an immigrant one who is lawfully within the country and who goes into foreign contiguous territory during the course of a practically continuous journey originating and ending at the same place within the United States. He does not, in my opinion, come within the statute, which defines an ‘immigrant’ as an alien departing from any place outside the United States destined for the United States; and it is equally absurd to hold that the alien’s status has been affected by the fact that he remained in Windsor some 25 minutes while his uncle transacted his business.

“It is said in *United States ex rel. Claussen v. Day*, 279 U. S. 398, 49 S. Ct. 665, 77 L. Ed. 1298: ‘The word “entry” by its own force implies a coming from outside. The context shows that in order that there be an entry within the meaning of the act there must be an arrival from some foreign port or place.’ In the opinion, no distinction is made between the return to the same or another port of the United States. In order to uphold the decision of the immigration authorities it is necessary to hold either that the alien became an immigrant because he did not come from one place in the United States to another, or because his journey was interrupted by the 25 minute stay in Canada. In my opinion, such a strict, literal interpretation of the statute leads to results both absurd and unjust. For example: It would not seem reasonable to class one crossing from Detroit to Buffalo, by automobile, as an im-

migrant merely because, while going in transit from one part of the United States to another, he stopped to take on a supply of gasoline. But conceding that the alien does not come within the exceptions noted above, it is still necessary, in order to establish an entry within five years prior to the conviction, to show that the alien came within the statutory definition of an 'immigrant' when he returned from his trip to Windsor. As above indicated, this is not shown.

"For that reason I have reached the conclusion that the immigration authorities have proceeded upon a misconception of the law applicable to the undisputed facts of the case."

In the instant case, likewise, when the appellee crossed over from San Ysidro to Tiajuana to be married and returned within four hours after leaving, he did not enter or re-enter within the express provisions of the Immigration Act of 1924, not being an alien at the time but a national of the United States, and not having departed from any place outside the United States for the United States.

Not having entered the United States within five years of his conviction, appellee is not subject to deportation.

We respectfully submit that the District Court was correct in the conclusion reached in relation to the matters presented in this appeal—and that the order appealed from should be affirmed.

Respectfully submitted,

L. A. GORDON and
HARRY WOLPIN,

Attorneys for the Appellee.

No. 11433

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALBERT DEL GUERCIO, District Director, Immigration and
Naturalization Service, Department of Justice, District
No. 16,

Appellant,

vs.

SEBASTIAN GABOT,

Appellee.

APPELLANT'S REPLY BRIEF.

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CLERK

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No. 11433

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ALBERT DEL GUERCIO, District Director, Immigration and
Naturalization Service, Department of Justice, District
No. 16,

Appellant,

vs.

SEBASTIAN GABOT,

Appellee.

APPELLANT'S REPLY BRIEF.

Appellee's brief for the most part is centered upon the argument that because petitioner was "lawfully admitted" to Hawaii on September 9, 1927 and "lawfully admitted" to the mainland of the United States on July 11, 1929, his departure to Mexico and return to the United States on March 20, 1934, cannot be construed as an "entry", relying upon the authority of *Annello v. Ward*, 8 F. Supp. 797. (App. Br. pp. 2, 3 and Part III.)

Counsel argues that even if the immigration laws are to be given effect to appellee's entry from Mexico on March 20, 1934, so as to fix the time of commission of the crime as being within five years of last entry, departure and re-entry to the United States under such circumstances could not be construed as an "entry" within the meaning of the immigration laws. The first part of the Government's argument will be directed to that issue.

“Entry” Within the Meaning of the Immigration Laws.

The *Annello v. Ward* case relied on by counsel clearly is not the law. The case refers to four leading decisions of the Supreme Court construing what constitutes an entry within the meaning of the immigration laws and dismisses all of them with the statement that “In my opinion it is carrying the application of the doctrine of the above cases too far to regard as an immigrant one who is lawfully within the country and who goes into foreign contiguous territory during the course of a practically continuous journey originating and ending at the same place within the United States.”

The fallacy of the decision lies in the conclusion that in order to establish an “entry” it must be shown that the alien comes within the statutory definition of an “immigrant” as set forth in section 3 of the Immigration Act of May 26, 1924 (8 U. S. C. 203), reading in part:

“When used in this Act the term ‘immigrant’ means an alien departing from any place outside the United States destined for the United States except * * *

(4) An alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory * * *.”

Granting of immigration visas began with the Immigration Act of May 26, 1924. Under the act aliens were placed under a classification, for documentary and statistical purposes, of “immigrant” with certain groups being excepted from the classification. The classes excepted from the term “immigrant” are for convenience referred to as “non-immigrants.” Whether an alien be regarded as an

“immigrant” and required to present a visa when he seeks admission (or be exempt from the presentation of documents by virtue of having been previously lawfully admitted for permanent residence), or whether he came within the classification of a “non-immigrant” and required to present other type documents the fact remains that both classes, whether seeking entry from a foreign place for the first time, or reentry after a temporary departure from the United States, are required to undergo immigration inspection, and are subject to all the laws and regulations pertaining to the exclusion of aliens. The Second Circuit Court of Appeals states the law in this respect as follows:¹

“Section 13(b) of the Immigration Act of 1924 (8 U.S.C.A. 213(b)) provides that immigrants who have been legally admitted to the United States, and who depart therefrom temporarily, may be readmitted without being required to obtain an immigration visa under such conditions as may be by regulations prescribed. But the regulations which permit aliens previously legally admitted to return from Canada within six months without having a passport, visa, or permit neither purport to nor could, in view of the express words of section 19, *supra*, dispense with inspection. Certain identification of aliens, if nothing more, is vital to the enforcement of the immigration laws and without inspection at the border any proper administration would be impossible.”

¹*United States v. Day*, 2d Cir., 45 F. (2d) 112.

It is not the classification of "immigrant" or the exception from that class as "non-immigrant" that determines whether an alien has effected an "entry" into the United States, but, rather, whether the alien has in fact come into the United States from a foreign port or place, whether or not inspected. Aliens were making "entries" and "re-entries" into the United States long before being classified under the Act of May 26, 1924, as "immigrant." Under the holding in the *Annello v. Ward* case a lawful resident alien making a temporary sojourn in foreign contiguous territory could commit a crime involving moral turpitude and if he admitted the fact the law would not exclude upon his return, neither would he be subject to deportation on a charge of having admitted the commission of such a crime prior to "entry" because under the reasoning of the court the alien's return to the United States would not under the law constitute an "entry."

If it had been charged in the deportation proceeding that the subject was an alien required to present certain documents at the time of re-entry, the classification of "immigrant" or "non-immigrant" would have been important because it would have been necessary to ascertain whether the alien was possessed of the appropriate documents. Deportation in the *Annello v. Ward* case being predicated upon conviction of a crime involving moral turpitude committed within five years after entry, for which the alien was sentenced to imprisonment for a term of one year or more, "It is immaterial whether he was entitled to admis-

sion or whether he lawfully entered. The cause for which his deportation was ordered arose after entry.”²

The decision is also *contra* to the decisions of the Circuit Courts of Appeal in the First³ Second,⁴ Fifth,⁵ Sixth,⁶ Seventh,⁷ Eighth,⁸ and Ninth Circuits.⁹

Validity of Regulation.

As to Part II of Appellee’s brief (pp. 6 to 7) the argument of the Government set forth in Part II of its opening brief (pp. 11 to 13) is adopted herein.

Neither of the two cases cited by Appellee involve the construction of a regulation which is restrictive or in conflict with an act of Congress enacting a particular law and authorizing promulgation of regulations thereunder.

Our contention is that the regulation in question is valid if given the proper application. By a proper application the regulation does not conflict or restrict the full application of the 1917 and 1924 Immigration Acts to citizens of the Philippine Islands after May 1, 1934, when Congress declared those Acts should be applied to Philippine

²*United States ex rel. Claussen v. Day*, 49 S. Ct. 354, 279 U. S. 398, 73 L. Ed. 758.

³*Ward v. De Barros*, 1st Cir., 75 F. (2d) 34.

⁴*United States v. Day*, footnote No. 1, *supra*.

⁵*Guarneri v. Kessler*, 5th Cir., 98 F. (2d) 580.

⁶*Jackson v. Zubrick*, 6th Cir., 59 F. (2d) 937.

⁷*Ng Sui Wing v. United States*, 7th Cir., 46 F. (2d) 755.

⁸*Medich v. Burmaster*, 8th Cir., 24 F. (2d) 57.

⁹*Ali v. Haff*, 9th Cir., 114 F. (2d) 369.

citizens in the same manner as to other aliens, with the exception of section 13(c) of the 1924 Act (8 U. S. C. 212(c)). The regulation applies only to "acts or conditions" that would have under the 1917 and 1924 Acts constituted grounds for deportation occurring between the effective dates of those acts and May 1, 1934. It will be noted that the regulation does not by its provisions prevent the exclusion (as distinguished from deportation) of citizens of the Philippine Islands for "any act of his" that occurred or "condition" that existed prior to May 1, 1934. Supposing in the example given in Government's opening brief (top of p. 9) such Philippine citizen departed to a foreign country after May 1, 1934 and thereafter sought re-entry. Clearly, such person would come within the criminally excluded classes enumerated in section 3 of the Immigration Act of 1917 (8 U. S. C. 136) providing:

"That the following classes of aliens shall be excluded from admission into the United States: * * * persons who have been convicted or admit having committed a felony or other crime or misdemeanor involving moral turpitude * * *."

Following the construction placed on the regulation by the District Court, if such Philippine citizen clandestinely reentered the United States, he could not be deported because the criminal "acts of his" occurred prior to May 1, 1934. Under a proper application of the regulation such a person while not subject to deportation if he remained

in this country could be deported if he left the United States and were successful in regaining entry, in that section 19 of the Immigration Act of 1917 (8 U. S. C. 155(a)) provides:

“That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law * * * shall, upon the warrant of the Attorney General, be taken into custody and deported.”

To follow the construction of the District Court would lead to the result that the class of criminal Philippine citizen mentioned in the example who left the United States after May 1, 1934, without breaking the continuity of his residence and surreptitiously regained entry subsequent to that date would not be amenable to deportation whereas the Philippine citizen having the same identical criminal record who either broke the continuity of his residence by leaving the United States after May 1, 1934, or who for the first time entered the United States without detection after May 1, 1934, would be subject to deportation. It is axiomatic that statutes are to be construed so as to avoid absurd results.¹⁰

¹⁰*Lau Ow Bew v. United States*, 12 S. Ct. 517, 144 U. S. 47, 36 L. Ed. 340.

Is "Entry" a Part of the Deportable Ground Where There Is a Conviction and Sentence for a Year or More for the Commission of a Crime Involving Moral Turpitude Committed Within Five Years After Entry?

Appellee quotes the remarks of the District Court for his argument under Part I of his brief (pp. 4, 5). The Court came to the conclusion that "it took the concurrence of the two acts", and that therefore "entry" was a part of the deportable ground. To the argument of Government's opening brief set forth in Part I (pp. 7 to 11), we add a reference to the decision of this Honorable Court filed on January 22, 1947, since writing our opening brief, in the case of *Del Guercio v. Delgadillo*, No. 11235, where-in the same deportable ground was under consideration and it was pointed out that deportation was predicated upon the conviction of crime and not upon the fact of entry.

It is noted that by a further regulation of the Attorney General relating to Philippine citizens entry prior to May 1, 1934, is considered in determining their immigration status for the purpose of receiving a reentry permit. The regulation is set forth in section 172.10, Title 8, Code of Federal Regulations, as follows:

"172.10. Philippine citizens; returning residents; reentry permits. (a) A citizen of the Philippine Islands lawfully admitted to the United States. * * * for permanent residence and whose original entry occurred after April 30, 1934, may make application for a reentry permit in the same manner as an alien. Such an application may also be made by a citizen of the

Philippine Islands *whose residence in the United States, * * * began prior to May 1, 1934* and who has continued to maintain his residence in the United States.” (Italics added.)

The entry prior to May 1, 1934, may also be considered in determining whether Appellee is deportable on the ground of having been sentenced to imprisonment for a year or more for the commission of a crime involving moral turpitude committed within five years after entry.

Respectfully submitted,

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On the Brief.

No. 11437

United States
Circuit Court of Appeals

For the Ninth Circuit.

GRIFFITHS AND SPRAGUE STEVEDORING
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tion,

Appellant,

VS.

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST, a corporation,
Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 298

Upon Appeal from the District Court of the United States
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Northern Division

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Western District of Washington, Northern Division

Civil Action No. 895

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST, a Corporation,
Plaintiff,

vs.

GRIFFITHS AND SPRAGUE STEVEDORING
COMPANY, INCORPORATED, a Corpora-
tion,
Defendant.

COMPLAINT

Plaintiff for cause of action alleges:

I.

That plaintiff, Waterfront Employers Association of the Pacific Coast, is now and at all times herein mentioned was a non-profit corporation organized and existing under and by virtue of the laws of the State of California; that the defendant, Griffiths and Sprague Stevedoring Company, Incorporated, is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Washington; that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

That the plaintiff has now and at all times herein mentioned has had among its purposes and objects

the representation of its members in matters relating to the employment of longshoremen and other shore employees and to act on behalf of its members in the development, establishment and maintenance of safe working conditions and rules relating thereto.

III.

That the defendant has now and at all times herein mentioned has had its principal place of business in King County in [2] the State of Washington, being engaged in the performance of ship, dock and other shore work requiring the employment of longshoremen and other shore employees and is now and at all times herein mentioned was a member of the plaintiff.

IV.

That the plaintiff is now and at all times herein mentioned has been performing its purposes and objects on behalf of its members and the defendant has participated in and enjoyed the benefits thereof.

V.

That pursuant to the by-laws of the plaintiff duly adopted to regulate its affairs and to further its objects and purposes the Board of Directors of the plaintiff duly levied and assessed against the members of the plaintiff a tonnage assessment which is now and at all times herein mentioned has been in full force and effect, to-wit, $2\frac{1}{2}$ cents per manifest ton (weight 2000 pounds, measurement 40 cubic feet) on all off-shore and intercoastal cargo handled by members, including such cargo handled for non-

members, payable at the end of each month. That said tonnage assessment is a reasonable compensation for the benefits which have accrued to and have been enjoyed by the defendant as a member of the plaintiff and which said tonnage assessment the defendant is obligated to pay and has agreed to pay.

VI.

That the plaintiff at all times herein mentioned has duly adopted and established a form and method of reporting cargo tonnage subject to the tonnage assessment, being a so-called "Monthly Report of Tonnage." That since the period ending March 31, 1942, the defendant has failed to report to the plaintiff in the manner and form so required by the plaintiff all of the cargo tonnage handled [3] by the defendant and subject to said tonnage assessment. That since the period ending March 31, 1942, the defendant has and continues to so report some of said cargo tonnage and pay the tonnage assessment due thereon. That the defendant has paid to the plaintiff an amount asserted by the defendant to be the tonnage assessment on all cargo tonnage not so reported for the period from March 31, 1942, to December 31, 1942, but has failed and refused to furnish to the plaintiff the required report of all said cargo tonnage for said period; that the plaintiff alleges on information and belief that the defendant has handled not less than 1,389,161 manifest tons of cargo for the period from January 1, 1943, to December 31, 1943, and that the tonnage assessment due thereon is not less than

\$34,729.02, no part of which has been paid although due demand for payment thereof has been made; that the plaintiff alleges that the defendant has handled large amounts of cargo subject to the tonnage assessment during the period January 1, 1944, to date, the amount thereof being to the plaintiff unknown and that but a fraction thereof has been reported and payment made thereon despite due demand therefor.

VII.

That the defendant should be required to account to the plaintiff for all cargo handled by the defendant since March 31, 1942, and to pay the tonnage assessment thereon, less the amounts heretofore paid thereon, together with interest on each amount thereof at 6% per annum from the date the same was due.

Wherefore, the plaintiff prays for a judgment requiring the defendant to report to and account to the plaintiff for all unreported cargo handled by the defendant subject to said tonnage assessment and that the plaintiff have judgment against the defendant in the sum of \$34,729.02, together with the additional tonnage [4] assessment due thereon with interest at 6% per annum from the several dates when the various portions thereof became due, together with the plaintiff's costs and disbursements herein to be taxed; and that the plaintiff

have such other, further or different relief as may be meet and proper.

BOGLE, BOGLE & GATES,
EDWARD G. DOBRIN,
Attorneys for Plaintiff.

[Endorsed]: Filed March 22, 1944. [5]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and answers plaintiff's complaint as follows:

I.

Answering paragraph IV thereof, defendant denies each and every allegation therein contained.

II.

Answering paragraph V thereof, defendant denies each and every allegation therein contained.

III.

Answering paragraph VI thereof, defendant admits that it has paid an amount for the period from March 31, 1942, to December 31, 1942, but denies each and every remaining allegation contained in said paragraph.

IV.

Answering paragraph VII thereof, defendant denies each and every allegation therein contained.

Further and by way of a First Affirmative Defense, the defendant alleges:

I.

That under the constitution and by-laws of the plaintiff, Waterfront Employers Association of the Pacific Coast, the membership of said organization consists of two classes, namely, voting members and associate members.

II.

That the defendant, by virtue of being engaged only in the stevedoring business, is an associate member only and, as such, has no vote in the plaintiff corporation and is not eligible to be a voting member of the plaintiff.

III.

That under the said constitution and by-laws of the plaintiff, the Board of Directors of plaintiff has no power to levy any assessment of the character described in plaintiff's complaint upon any associate member, and that in consequence any action of said Board of Directors purporting to levy such assessment against the defendant is invalid and unenforceable.

Further and by way of a Second Affirmative Defense, the defendant alleges:

I.

That under the constitution and by-laws of the plaintiff, Waterfront Employers Association of the Pacific Coast, the Board of Directors of said corporation, in levying assessments upon the member-

ship, is required to make any such levy uniformly applicable to the entire membership of the class affected by said assessment.

II.

That there are a large number of associate members of the plaintiff corporation doing business both in the Port of Seattle and elsewhere whose membership status in the plaintiff corporation is precisely the same as that of defendant, but against whom plaintiff does not purport to levy any assessment [7] for the support of the plaintiff corporation.

III.

That there are other members of plaintiff who are either voting members or associate members against whom the plaintiff purports to levy an assessment based on the amount of tonnage handled in stevedoring operations of such members, but in the case of such members such assessment is computed and applied upon a basis more favorable than that sought to be applied in the case of said defendant in that such other members furnished stevedoring service which includes certain operations and use of longshoremen not included in the stevedoring operations of the defendant; that by reason of the different character of its operations, defendant should be in a different classification from such other members, and the attempt of plaintiff to levy an assessment against defendant upon the same basis as it levies assessments against such other members who are engaged in a different type of

stevedoring operation results in lack of uniformity in the levy of such assessments by plaintiff.

IV.

That in consequence of the lack of uniformity in plaintiff's program for levying assessments on the membership of the plaintiff corporation, as alleged in the two last preceding paragraphs hereof, the assessments sought to be enforced against the defendant in this action are invalid and unenforceable.

Further and by way of a Third Affirmative Defense, the defendant alleges:

That insofar as any action of the Board of Directors of the plaintiff purports to levy assessment upon the defendant of the character alleged in the complaint, such assessments [8] are sought to be charged with respect to shipments made for the account of, and at the expense of, the United States Government, and it is the purpose and theory of such alleged action upon the part of the said Board of Directors of the plaintiff that the defendant shall collect the amount of such assessment from the United States Government, in addition to the charge actually made for services rendered by the defendant to the Government, to the end that the Government and not the defendant would bear the burden of such assessment; that inasmuch as such action of the Board of Directors would require or seek to induce the defendant to exact from the Government of the United States an amount to be paid to the support of the plaintiff organization, in which said

Government of the United States is not a member or in any way interested, such action of the Board of Directors is contrary to public policy and void, and the purported levy of such assessments on defendant is, therefore, invalid and unenforceable.

Further and by way of a Fourth Affirmative Defense, the defendant alleges:

That any written or oral statement of defendant upon which the plaintiff purports to rely in support of the allegations of paragraph V of its complaint is not in truth and in fact an agreement to be legally liable on account of any assessment claimed by plaintiff, because it has at all times been specifically understood and agreed between the parties to this action that the defendant has at all times denied any legal liability to pay any assessment levied against it; and that all statements by or on behalf of defendant relative to the payment of any such assessment have at all times been understood by plaintiff and defendant to constitute only a [9] declaration of intention on the part of the defendant without subjecting it to any legal liability, and that even such declarations of intention have at all times been conditioned upon the understanding that the Board of Directors of the plaintiff would take some further action which would result in a fair and equitable program for the support of the plaintiff corporation, under which program all members of the same class would be called upon to contribute their just proportion of moneys necessary for the support of the plaintiff.

Further and by way of a Fifth Affirmative Defense, the defendant alleges:

I.

That it is engaged in the stevedoring business in the State of Washington, with its principal activities at the Port of Seattle, in said State; that in order to engage in said business, it requires the services of longshoremen, all of whom are members of the International Longshoremen's and Warehousemen's Union; that it would be impossible for the defendant to conduct its business with longshoremen who are not members of the Union.

II.

That plaintiff and the said Union jointly operate the hiring halls through which defendant must obtain the longshoremen necessary for its business; that if defendant were to withdraw from the plaintiff corporation, the plaintiff would attempt to exact from defendant four cents (4c) per man hour for each longshoreman hired by it, and if defendant would pay at the rate of four cents (4c) per man hour, the total amount so paid would be even greater than the amount sought to be collected from defendant as a member of the [10] plaintiff corporation by virtue of the alleged assessment mentioned in plaintiff's complaint; that if defendant should withdraw as a member of plaintiff corporation and should thereafter refuse to pay to the plaintiff an amount equal to four cents (4c) per man hour for each longshoreman employed by it, the plaintiff would, as defendant is informed and

believes, act in combination with said union so as to prevent defendant from procuring the longshoremen necessary for the conduct of defendant's business; that under these circumstances the defendant is compelled to remain a member of the plaintiff in order to protect its business, and that any apparent agreement or acquiescence on the part of the defendant in the assessments asserted against it by plaintiff is in material part the result of duress, consisting of the facts hereinbefore alleged, and, therefore, does not constitute any basis for any liability of defendant to plaintiff.

Wherefore, having fully answered, defendant prays that plaintiff's complaint be dismissed, and that it have judgment against the plaintiff for its costs and disbursements herein.

EDWARD N. HAY,

DAVID O. HAMLIN,

McMICKEN, RUPP &
SCHWEPPE,

J. GORDON GOSE,

Attorneys for Defendant.

Copy received May 10, 1944.

BOGLE, BOGLE & GATES.

[Endorsed]: Filed May 10, 1944. [11]

[Title of District Court and Cause.]

REQUEST FOR ADMISSION UNDER RULE
36 OF THE FEDERAL RULES OF CIVIL
PROCEDURE

Plaintiff, Waterfront Employers Association of the Pacific Coast, a Corporation, requests defendant, Griffiths and Sprague Stevedoring Company, Incorporated, a Corporation, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That Exhibit 1 hereto is a true copy of the Constitution and By-Laws of the plaintiff, as amended, and in effect since July, 1937.

2. That the defendant by its duly authorized officer, signed the Constitution and By-Laws of the plaintiff on or about July, 1937.

3. That Exhibit B to the plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution duly adopted by the Board of Directors of the plaintiff on July 31, 1937.

4. That Exhibit 2 hereto is a true copy of the form of "Monthly Report of Tonnage" now and at all times mentioned in the complaint herein, provided by the plaintiff for reporting the cargo tonnage subject to tonnage assessment, as fixed by the Board of Directors of the plaintiff. [12]

5. That Exhibit C to the plaintiff's Bill of Particulars on file herein sets forth a true copy of a

resolution duly adopted by the Board of Directors of the plaintiff on May 11, 1938.

6. That Exhibit 3 hereto is a true copy of a letter of May 20, 1938, from the plaintiff, which was received by the defendant on or about the date it bears.

7. That Exhibit D to the plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution duly adopted by the Board of Directors of the plaintiff on February 4, 1940.

8. That Exhibit E to the plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution duly adopted by the Board of Directors of the plaintiff on May 8, 1940.

9. That Exhibit F to the plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution adopted by the Board of Directors to the plaintiff on May 8, 1940.

10. (Omitted by request—Clerk)

11. (Omitted by request—Clerk)

12. That Exhibit 4 hereto is a true copy of a resolution duly adopted by the Board of Directors of the plaintiff on May 9, 1940.

13. That Exhibit 5 hereto is a true copy of the Memorandum Agreement signed by the defendant on or about May, 1940.

14. That Exhibit G to the plaintiff's Bill of Particulars on file herein sets forth a true copy

of a resolution duly adopted by the Board of Directors of the plaintiff on August 14, 1940. [13]

15. That Exhibit 6 hereto is a true copy of a letter of August 17, 1940 from the plaintiff, which was received by the defendant on or about the date it bears.

16. That Exhibit H to the plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution duly adopted by the Board of Directors of the plaintiff on March 12, 1941.

17. That Exhibit I to the plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution duly adopted by the Board of Directors of the plaintiff on April 16, 1942.

18. That Exhibit 7 hereto is a true copy of letter of April 27, 1942 from the plaintiff, which was received by the defendant on or about the date it bears.

19. That Exhibit J to the plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution duly adopted by the Board of Directors of the plaintiff on June 25, 1942.

20. That Exhibit 8 hereto is a true copy of a letter of July 1, 1942 from the plaintiff, which was received by the defendant on or about the date it bears.

21. That the copy of letter of October 27, 1942 to the defendant, signed by K. J. Middleton on behalf of the plaintiff and being Exhibit N (pages

1 and 2) to the plaintiff's Bill of Particulars on file herein, is a true copy of the original received by the defendant on or about the date it bears.

22. That the copy of letter of November 2, 1942 from the defendant, signed by F. E. Settersten, addressed to K. J. Middleton, Waterfront Employers of Washington, and being Exhibit O to the plaintiff's Bill of Particulars on [14] file, is a true copy of the original delivered by the defendant to the plaintiff on or about the date it bears.

23. That Exhibit K to the plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution duly adopted by the Board of Directors of the plaintiff on November 11, 1942.

24. That Exhibit L to the plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution duly adopted by the Board of Directors of the plaintiff on November 12, 1942.

25. That the copy of the Special Committee Report set forth on Exhibit L to the plaintiff's Bill of Particulars on file herein is a true copy of the Special Committee Report attached to the resolution adopted by the Board of Directors of the plaintiff on November 12, 1942, as set forth on Exhibit L to said Bill of Particulars.

26. That on and after June 18, 1934 the defendant was and still is a member of the Waterfront Employers of Washington, a corporation.

27. That Exhibit 9 hereto is a true copy of a

resolution duly adopted by the Board of Directors of the plaintiff on February 25, 1943.

28(a). That a meeting of the Board of Trustees of the Waterfront Employers of Washington was duly held on March 10, 1943 at which meeting F. E. Settersten and M. E. Hay, representing the defendant, were present, together with a committee from San Francisco consisting of W. J. Bush, Thomas James, J. A. Lunny and W. T. Sexton, representing the plaintiff and appointed pursuant to the resolution of the Board of Directors of the plaintiff set forth on Exhibit 9 hereto. [15]

28(b). That at said meeting of the Board of Trustees of the Waterfront Employers of Washington held on March 10, 1943, M. E. Hay on behalf of the defendant, as his client and principals, stated as follows:

“* * that his principals had met with the Committee from San Francisco and had ironed out with them certain matters which had been misunderstood or in dispute and that his client felt that, having accepted benefits of the Coast Association, there was a moral obligation to pay for such benefits, that the matter of legal liability was waived, and that his client would pay back assessments of 2½¢ a ton, and future assessments made by the Coast Association, the method of payment to be arrived at with the San Francisco Committee following adjournment of this meeting.”

29. That the copy of the letter of March 11, 1943 from the defendant, signed by M. E. Hay,

Secretary, addressed to the Committee, Waterfront Employers Ass'n. of the Pacific Coast, set forth on Exhibit P (page 1) to the plaintiff's Bill of Particulars on file herein, is a true copy of the original delivered by the defendant to the plaintiff on or about the date it bears.

30. That subsequent to March 11, 1943 the defendant paid to the plaintiff the amounts asserted by the defendant to be the balance due on the tonnage assessment owing to the plaintiff from the defendant for a period ending December 31, 1942.

31. That since the period ending March 31, 1942 the defendant has failed to report to the plaintiff on said form, Exhibit 2 hereto, all of the cargo tonnage handled by the defendant and claimed by the plaintiff to be subject to the tonnage assessment and has not paid the tonnage assessment alleged to be due thereon.

32(a). That on or about February 1944 and prior to the institution of this action the defendant made a tender to the plaintiff of a check in the amount of \$17,364.51, [18] which check had endorsed thereon "In full payment of 1943 tonnage assessments."

32(b). That said tender and check were not accepted by the plaintiff.

33. (Omitted by request—Clerk)

BOGLE, BOGLE & GATES
EDWARD G. DOBRIN,

Attorneys for Plaintiff.

Copy received August 11, 1944.

McMICKEN, RUPP &
SCHWEPPE,

Attorneys for Defendant.

Cause 895, Plaintiff Exhibit 26 not offered.

[Endorsed]: Filed Aug. 11, 1944. [17]

[Title of District Court and Cause.]

AMENDED STATEMENT OF DEFENDANT
WITH RESPECT TO PLAINTIFF'S RE-
QUEST FOR ADMISSIONS UNDER
RULE 36.

Comes now the defendant and makes the following amended statement with respect to the thirty-three separately numbered items set forth in the Request for Admission Under Rule 36, heretofore filed herein by plaintiff.

I.

Defendant admits the truth of the facts stated in items 1, 2, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32a and 32b.

II.

Defendant admits the truth of the facts stated in item 28a, except that defendant denies any implication contained therein that the persons named therein were the only persons present at said meeting.

III.

Defendant admits, with respect to item 28b, that

the statements therein attributed to "M. E." Hay are a paraphrase of a part of what was said at said meeting by E. M. Hay, but defendant denies any possible implication that the statement as set forth expresses the verbatim language used by E. M. Hay or that the said statement constitutes all that was said by Mr. Hay at the meeting with respect to the subject matter contained in the quoted statement. [18]

IV.

(Omitted by Request—Clerk.)

E. M. HAY

DAVID O. HAMLIN

McMICKEN, RUPP &

SCHWEPPE,

J. GORDON GOSE,

Attorneys for Defendant.

State of Washington,
County of King—ss.

F. E. Settersten, being first duly sworn, on oath deposes and says:

That he is the President of the defendant corporation; that he has read the foregoing statement, knows the contents thereof and believes the same to be true.

F. E. SETTERSTEN

Subscribed and sworn to before me this 28th day of February, 1945.

J. GORDON GOSE,

Notary Public in and for the State of Washington,
residing at Seattle.

Copy received March 6, 1945.

BOGLE, BOGLE & GATES

Cause 895, Plaintiff Exhibit 27 not offered.

Entered:

[Endorsed]: Filed March 6, 1945. [19]

[Title of District Court and Cause.]

ANSWER TO WRITTEN INTERROGA-
TORIES NUMBERS 1 TO 5 PROPOUNDED
BY PLAINTIFF.

Comes now F. E. Settersten, President of the defendant corporation, and answers interrogatories numbers 1 to 5, inclusive, of the interrogatories heretofore propounded by the plaintiff to defendant under Rule 33 of the Federal Rules of Civil Procedure, as follows:

Interrogatory No. 1: For the period of March 1, 1942 to the date of your answer or for the period next preceding the date of your answer for which information is available, furnish all of the information as called for on Exhibit 1 attached hereto, omitting the certification and following the in-

structions contained thereon, disclosing all cargo which the defendant has loaded to or discharged from vessels during said period.

A. There are furnished herewith, marked as Exhibits 1 to 18, inclusive, monthly reports of tonnage on forms provided by plaintiff, showing all cargo handled by defendant for the War Shipping Administration for the period from March 1, 1942 to January 31, 1945.

Upon examination of these Exhibits, it will be noted that as to certain calendar months no monthly report is filed. The reason is that the defendant did not handle any cargo for the War Shipping Administration during any calendar [20] months other than those specifically covered by said Exhibits 1 to 18.

The defendant has been advised by the Judge Advocate General of the United States Army that it may furnish to the plaintiff information as to the amount of cargo handled by defendant for the United States Army, but that such information should be given only upon a calendar year basis and without indicating the particular amount carried by any ship. A copy of the letter from the Judge Advocate General on this subject is hereto attached, marked Exhibit "A." In accordance with the permission there contained, the defendant states that from March 1, 1942 to December 31, 1944, it has provided stevedoring service to vessels carrying cargo for the United States Army and that the

volume of the cargo so handled by the defendant is as follows:

From March 1, 1942 to December 31, 1942—
714,817 tons;

From January 1, 1943 to December 31, 1943—
1,389,161 tons;

From January 1, 1944 to December 31, 1944—
1,589,681 tons.

No other cargo than that hereinbefore mentioned has been handled by the defendant during the periods above mentioned.

Interrogatory No. 2: In connection with your answer to Interrogatory No. 1, state or indicate in the information supplied respect thereto the cargo tonnage listed therein which you have heretofore reported to the plaintiff, the date of such report, the amount of tonnage assessment paid on each report and the date of such payment.

A. All of the cargo handled by the defendant for the account of the War Shipping Administration, as stated in the answer to Interrogatory No. 1, has been heretofore reported to the plaintiff, and the so-called tonnage assessment of $2\frac{1}{2}c$ per ton has been paid thereon by the defendant to the plaintiff. There is attached hereto, marked Exhibit [21] "B," a schedule showing the dates of all such reports and the dates and amounts of all payments made thereon.

Defendant has also reported to and paid the plaintiff the so-called tonnage assessment of $2\frac{1}{2}c$

per ton on all cargo handled by it for the United States up to December 31, 1942, as shown in the answer to Interrogatory No. 1 above. There is hereto attached, marked Exhibit "C," a schedule showing the dates of payment and the amounts paid at 21½¢ per ton on account of such Army cargo for said period from March 1, 1942 to December 31, 1942.

Defendant further reported to the plaintiff, in writing, on or about January 25, 1944, all tonnage handled by it for the United States Army for the calendar year 1943 in the amount of 1,389,161 tons, being the same amount shown in the answer to Interrogatory No. 1 above. This report was accompanied by a tender of the sum of \$17,364.51, as a full voluntary payment of the so-called tonnage tax for the calendar year 1943.

Defendant has at no time prior hereto reported the amount of any tonnage handled by it for the United States Army after December 31, 1943, nor has any amount been paid on any such tonnage handled after December 31, 1943.

Interrogatory No. 3: In connection with your answer to Interrogatory No. 1, state or indicate in the information supplied in respect thereto which of the vessels were loaded or discharged for or on account of the United States of America and indicate for which agency thereof, as for example, the War Department, the Department of the Navy, the War Shipping Administration or other agency or subordinate agency.

A. See answer to Interrogatory No. 1.

Interrogatory No. 4: If in connection with your answer to Interrogatory No. 3 you state or indicate that certain [22] of the vessels were loaded or discharged for or on account of the United States of America, state whether such work was done under a written contract or contracts.

A. All work performed in connection with the cargo mentioned in the answer to Interrogatory No. 1 was performed under written contracts with the War Shipping Administration and the United States Army, respectively.

Interrogatory No. 5: If in connection with your answer to Interrogatory No. 4 you state that such work was done under a written contract or contracts, furnish a copy of said contract or contracts and if there are more than one contract, state as to each vessel under which contract the work was being performed.

A. Defendant supplies herewith copies of the following contracts with the United States Army:

1. Contract No. W 2031-qm-577, O. I. No. 77, dated August 22, 1942, marked Exhibit 19.

2. Contract No. W 2031-te-1190, O. I. No. 690, dated July 1, 1943, marked Exhibit 20.

3. Contract No. W45-045 te-274, O. I. No. 274-44, dated June 30, 1944, marked Exhibit 21.

By agreement with counsel, there has been elim-

inated from each of the three contract unit prices charged by the defendant for its services.

F. E. SETTERSTEN
E. M. HAY,
DAVID O. HAMLIN,
McMICKEN, RUPP &
SCHWEPPE,
J. GORDON GOSE,
Attorneys for Defendant.

(Clerk's note: Exhibits omitted herefrom on request of Appellee.) [23]

State of Washington,
County of King—ss.

F. E. Settersten, being first duly sworn, on oath deposes and says:

That he is the President of the defendant corporation; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true.

F. E. SETTERSTEN

Subscribed and sworn to before me this 8th day of March, 1945.

J. GORDON GOSE,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed March 22, 1945. [24]

[Title of District Court and Cause.]

ANSWER TO WRITTEN INTERROGATORIES
NUMBERS 6 TO 15 PROPOUNDED BY
PLAINTIFF.

Comes now F. E. Settersten, President of the defendant corporation, and answers interrogatories numbers 6 to 15, inclusive, of the interrogatories heretofore propounded by the plaintiff to defendant under Rule 33 of the Federal Rules of Civil Procedure, as follows:

Interrogatory No. 6: Did the plaintiff prior to the institution of this action perform any of its purposes and objects as set forth in paragraph II of the complaint in which you participated or of which you enjoyed the benefits? A. Yes.

Interrogatory No. 7: Has the plaintiff since the institution of this action performed any of its purposes and objects as set forth in paragraph II of the complaint in which you have or now are participating or enjoying the benefits? A. Yes.

Interrogatory No. 8: If your answer to interrogatory No. 6 is in the affirmative, state the nature and extent of the performance of such purpose and objects, together with the nature and extent of your participation therein and enjoyment of the benefits thereof and for what period of time.

A. The plaintiff prior to the institution of this [25] action negotiated contracts with the Labor Union, of which the defendant's longshoremen employees were members, and the defendant at all

times while such contracts were in force hired its said employees in accordance with such contracts.

Interrogatory No. 9: If your answer to interrogatory No. 7 is in the affirmative, state the nature and extent of the performance of such purposes and objects, together with the nature and extent of your participation therein and enjoyment of the benefits thereof and for what period of time.

A. Since the institution of this action, the plaintiff has continued to negotiate labor contracts on behalf of its membership, and defendant has continued to employ longshoremen in accordance with the terms of such contracts.

Interrogatory No. 10: (Omitted by request—Clerk).

Interrogatory No. 11: (Omitted by request—Clerk).

Interrogatory No. 12(a): What office or offices has F. E. Settersten held in the defendant and what position or positions has he held with the defendant for the years 1942, 1943, and 1944, giving the period by dates of each?

A. President and Director during entire period.

Interrogatory No. 12(b): What office or offices has M. E. Hay held in the defendant and what position or positions has he held with the defendant for the years 1942, 1943 and 1944, giving the period by dates of each?

A. E. M. Hay, not M. E. Hay, held the positions

of Secretary-Treasurer and Director during all of these three years.

Interrogatory No. 12(c): What office or offices has M. J. Weber held in the defendant and what position or positions has he held with the defendant for the years 1942, 1943, and 1944, giving the period by dates of each? [26]

A. Vice-President during entire period.

Interrogatory No. 12(d): (Omitted by request—Clerk).

Interrogatory No. 13: (Omitted by request—Clerk).

Interrogatory No. 14: (Omitted by request—Clerk).

Interrogatory No. 15: At what rate of tonnage assessment was the sum of \$17,364.51 tendered to the plaintiff prior to the institution of this action calculated?

A. One and one-fourth cents ($1\frac{1}{4}$ c) per ton.

F. E. SETTERSTEN

E. M. HAY

DAVID O. HAMLIN

McMICKEN, RUPP &
SCHWEPPE

J. GORDON GOSE

Attorneys for Defendant.

State of Washington

County of King—ss.

F. E. Settersten, being first duly sworn, on oath deposes and says:

That he is the President of the defendant corporation, that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

F. E. SETTERSTEN

Subscribed and sworn to before me this 27th day of December, 1944.

[Seal] J. GORDON GOSE

Notary Public in and for the State of Washington,
residing at Seattle.

Copy received Dec. 28, 1944.

BOGLE, BOGLE & GATES

[Endorsed]: Filed Dec. 29, 1944. [27]

[Title of District Court and Cause.]

COURT'S ORAL DECISION

December 15 1945

Black, J.

The Court: Gentlemen, before I take up what I have to say in connection with the two cases, I will make a rather general statement which you counsel are entitled to receive. I have asked counsel

in the case ordinarily known as the Waterfront Employers case, and counsel in the case generally called Hathaway vs. Boeing to be present so that I might make certain announcements. I, at least, was quite careful to ask that the notice that went to you be not more definite than that.

In connection with the Waterfront Employers case particularly counsel and those whom counsel represent are entitled to some explanation. The case was submitted to me about the 10th of July. Something more than five months has elapsed since that period. Counsel will never be able to explain to their clients what it has taken the Judge so long. I may say that beginning with the first of July I have had more responsibility than my time or strength was able to cope with. With the exception of this one case, I nevertheless think that all of my decisions have been kept reasonably punctual. There has been no delay as to any matter in Eastern [27-A] Washington, and I have had many problems. With one exception, there has been no substantial delay in decisions in Western Washington aside from the Waterfront Employers case. I think that there is good reason for the delay in connection with such other matter which I am not mentioning this morning.

The Waterfront Employers case was very complex in the problems and issues presented and in the presentation. More than that, it was interrupted necessarily in the reception of evidence. In attempting to keep up with my schedule some matters were sure to get more than their share of apparent

delay, and the most the attorneys can advise their client in that case is that unfortunately their case was the one that was crowded by my attempt to take care of the business that Judge Schwellenbach's resignation produced for some judge. Under the law making me a roving judge, that was my task.

I am not going to be able to give a decision in either of the cases concerning which I have asked counsel to appear this morning. I am going to make an announcement in each. In each case I am going to announce what my decision is, that is, my decision as to who wins and in the case where necessary how much. I am not going to attempt in either case to give a decision that would be appropriate for print. I will not in either case give a decision which would be very satisfactory to the attorneys or litigants as to an analysis of their arguments presented. There comes a time, however, that the parties would like to know the result regardless of the reasons. Certainly, in the Waterfront case that time has come. Therefore, I am going to take it up first.

In Cause No. 895, entitled Waterfront Employers Association of the Pacific Coast, a corporation, plaintiff, versus Griffiths & Sprague Stevedoring Company, Inc., a corporation, [27-B] defendant, the plaintiff seeks to recover a very substantial amount from the defendant for what have been sometimes referred to as tonnage assessments for 1943 and 1944, as I remember it, and allegedly owed by defendant to plaintiff as a member of plaintiff's association.

Counsel presented their respective contentions very ably. In addition to such oral assistance as the Court received, very excellent briefs were submitted. I considered all of the contentions and all of the evidence and exhibits and various citations. Upon consideration of all of such I came to the conclusion some considerable time ago as to which party was entitled to win unless there was some further reason in favor of the other side which had not been presented either by argument or express pleading, and, therefore, I investigated that avenue.

After considering every phase of the matter and the evidence as presented, I am satisfied that the plaintiff is entitled to recover. That will be the judgment.

I am not going to endeavor now to analyze the evidence, the arguments or the citations. It may be advisable in the next week or two in connection with such findings as may be presented that I be more explicit in my conclusions and views. On the other hand, I am sure that it would be better for the parties to know today what the result will be rather than wait for the result with more admirable discussion.

In brief I may say that a most persuasive consideration was that the defendant had paid a portion of these dues or assessments and that the defendant by language strongly indicated its intention to pay the balance. In addition, I may say that it was most persuasive to me that the defendant obtained benefits which if the Association had not existed, the defendant would have under the evi-

dence expended a substantial [27C] amount necessarily to get.

I am very mindful of the position of the defendant that its payment of these dues is against public policy by virtue of services rendered the government. I am very mindful of the cases which the defendant cited. I don't know that I disagree at all with the decision in those cases upon the facts which were there present. The language that the Court used in one or more of those decisions was more general than the Court needed to use. The facts in the cases relied upon by the defendant most properly, in my opinion, justified the result, but did not justify conclusive language. The Illinois decision, I think, was correct as to the facts therein involved. That decision, of course, supported the plaintiff. The distinction which may be roughly given is this, that in this instant case the Association was furnishing benefits which the defendant needed and which were advantageous to the government and which, if the Association did not exist, the defendant would have expended money for to obtain otherwise and the government would have wished the defendant to expend such money for such benefits.

That is a far cry from the Kentucky situation, if I remember the jurisdiction correctly, where the dues were for something that in no wise benefited the public agency which was letting the contract.

There was one avenue which I explored which at most was hinted at in the trial of this case. It may be that if that avenue had been developed by evi-

dence, the result would be somewhat different. But under the evidence as it was developed, that avenue did not lead to any destination hurtful to plaintiff, and, therefore, both parties are entitled to know that my judgment is for plaintiff in the amount [27-D] prayed for.

There was no dispute, as I remember it, in the amount. The question was merely whether the plaintiff was to get what it asked or nothing.

I expect to be available after the 21st of this month until the 31st with a possible emergency trip to Spokane and Walla Walla, and as counsel need my views on particular matters for findings, I will be available. All I can say in justification of this unsatisfactory decision from the standpoint of an analysis of evidence or authority is that I think the time has come when you gentlemen should have the result, and that result, of course, is agreeable to one side and not to the other. Thank you, gentlemen.

(N.B. With reference to the Waterfront Employers case, same technically probably was submitted on September 24, 1945, being the date of receipt of letter from counsel enclosing copy of late court decision cited, although submitted in the main on July 10, 1945.)

[Endorsed]: Filed Dec. 18, 1945. [27-E]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having heretofore been tried before the undersigned Judge of the above-entitled Court without a jury, plaintiff being represented by its attorney, Bogle, Bogle & Gates, Edward G. Dobrin and Stanley B. Long, and the defendant represented by its attorneys, E. M. Hay, David O. Hamlin, McMicken, Rupp & Schweppe and J. Gordon Gose, and the Court having taken its decision under advisement and having thereafter given its oral opinion in favor of plaintiff and being well advised in the premises, hereby from the pleadings, including the bills of particulars, and the evidence presented, including the answers to interrogatories and statements with respect to request for admissions prior to the trial and introduced in evidence at the trial, and stipulations between the parties, makes the following

FINDINGS OF FACT

1. The plaintiff, Waterfront Employers Association of the Pacific Coast, is now and since June, 1937 has been a non-profit corporation organized and existing under and by virtue of the laws of the State of California.

2. The defendant, Griffiths and Sprague Stevedoring Company, Incorporated, is now and at all times herein mentioned with a corporation organized and existing under and by virtue of the laws of the State of Washington and having its prin-

incipal place of business in the City of Seattle, County of King, in [28] said State.

3. Diversity of citizenship exists between the plaintiff and the defendant and the matter in controversy exceeds, exclusive of interests and costs, the sum of \$3,000.00.

4. Those eligible for membership in plaintiff are persons, individual or corporate, regularly engaged in carrying cargo by water to or from any United States Pacific Coast port (except Alaska) or any designated agent of any such, all thereof being voting members, of whom there are 84; and persons, individual or corporate, employing longshoremen or other shore employees in any such Pacific Coast port, including stevedores and terminal operators, and any association or corporation composed of such employers, all thereof being associate members, of whom there are 47.

5. The defendant since prior to the organization of plaintiff has been engaged as a stevedore in the performance of ship, dock and other shore work at the port of Seattle and other ports in the State of Washington, employing longshoremen and other shore employees for that purpose, and since July, 1937 has been and is now an associate member of the plaintiff, and defendant has at all times since becoming a member of plaintiff hired its longshore and other shore employees in accordance with and under labor agreements negotiated and administered by the plaintiff.

6. The purposes and objects of the plaintiff are

set forth in its Articles of Incorporation and By-Laws. The defendant at all times since becoming a member of plaintiff has participated in and enjoyed the benefits thereof.

7. Pursuant to the By-Laws of the plaintiff its Board of Directors duly levied and assessed against the member of the plaintiff a tonnage assessment which is now and at all times since before 1940 has been in full force and effect, [29] to-wit: 21½ cents per manifest ton, on all off-shore and inter-coastal cargo handled by members loaded upon or discharged from vessels, including such cargo handled for non-members, payable at the end of each month.

8. Commencing with the war emergency, in addition to many other activities, the plaintiff supplied much statistical data and assistance to the Pacific Coast Maritime Industry Board, the War Shipping Administration, the Army and the Navy in connection with labor matters, including accident prevention, and the government agencies and departments above-mentioned have made extensive use thereof.

9. Members of plaintiff engaged in stevedoring (loading cargo upon and discharging cargo from vessels) signed an agreement dated May 9, 1940 whereby they agreed to collect the tonnage assessment from non-members for whom they so loaded or discharged cargo. The defendant signed said agreement on or about May, 1940.

10. From the organization of plaintiff its mem-

bers have loaded cargo upon or discharged from vessels for various agencies of the government, including the Army and the Navy and the member so loading or discharging this cargo has reported the tonnage and paid the tonnage assessment thereon. In 1940 defendant commenced to load and discharge cargo for the Army and reported the tonnage and paid the tonnage assessment thereon without questioning its obligation so to do. As the preparations for war increased and on the advent of the war the cargoes loaded and discharged for the government increased until substantially all cargoes were being transported by agencies of the government, including in addition to the Army and the Navy, the War Shipping Administration, which latter agency took over substantially all private shipping operations. [30]

11. The defendant continued to report the cargo so loaded upon or discharged from vessels by it for the Army and for other government agencies and paid the tonnage assessment thereon except that after March, 1942 it discontinued reporting the tonnage so loaded or discharged by it for the Army and discontinued paying tonnage assessments thereon after October, 1941.

12. On March 11, 1943 the plaintiff accepted from the defendant a letter signed on its behalf by its secretary-treasurer, director and attorney, reading as follows:

“This is to advise you that on the tonnage handled by us for the U. S. Army up until January

31, 1943, upon which no tonnage assessment has been paid, we will pay the Waterfront Employers Association of the Pacific Coast the tonnage assessment of 2½¢ per ton on a volume tonnage to be determined; payment to be made in approximately equal installments of thirty, sixty and ninety days from this date.

“Also from February 1, 1943 onward, we will pay the tonnage assessments currently at the rate set by the Coast Association.”

13. Following the delivery of said letter on March 11, 1943 defendant paid to plaintiff in installments the tonnage assessments due for the period ending December 31, 1942 on cargo so loaded or discharged by it for the Army, the last payment being made on November 23, 1943.

14. The defendant has at all times recognized and never questioned its obligation to report the tonnage of cargo loaded upon or discharged from vessels by it for the United States acting through the agency of the War Shipping Administration and has paid the tonnage assessments thereon to plaintiff, the last payment thereon being first made after the commencement of this action.

15. In order for the defendant to have handled the loading of cargo upon and discharging from vessels for the Army it needed the services performed by plaintiff and if it [31] had not secured such services from plaintiff the defendant would have needed to have furnished them itself at a

much greater cost to defendant than the assessments levied and charged by plaintiff.

16. The government agencies, the War Shipping Administration, the Army and the Navy have recognized the tonnage assessment to be a legitimate business expense of the member paying for the same and have allowed the tonnage assessment as a part of the overhead expense.

17. The said tonnage assessment is a uniform assessment falling equally and alike on all members of the plaintiff, both voting and associate, who load or discharge cargo upon or from vessels on the Pacific Coast and is a just and equitable amount to be paid by the members of the plaintiff to provide for the general support of the plaintiff and is commensurate with the value of the services performed by the plaintiff which its members, including the defendant, have enjoyed and needed.

18. The assessments at the rate of $2\frac{1}{2}$ cents per ton are assessed or levied with respect only to cargo loaded upon or discharged from any vessel. Neither a steamship company voting member nor a stevedoring company associate member nor a terminal company associate member is subject to any assessment with respect to cargo operations by any of them on the docks or in the warehouses as distinct from loading cargo upon or discharging such from vessels, as aforesaid.

19. All members of the plaintiff and of the Port Associations which are members of plaintiff, have paid all the tonnage assessments on all cargo

loaded on or discharged from vessels by them, including cargo loaded or discharged for government agencies, including the Army, with the exception of defendant and two much smaller delinquents in smaller out ports. [32]

20. The defendant has loaded or discharged cargo on or from ships for the Army for which it has not paid the tonnage assessment as follows: 1,289,161 tons in the year 1943; 1,589,681 tons in the year 1944. The tonnage assessment thereon at $2\frac{1}{2}$ cents per ton is as follows: \$34,729.02 for the year 1943; \$39,742.02 for the year 1944, or a total sum of \$74,471.04.

From the foregoing Finds of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The defendant is indebted to the plaintiff in the sum of \$74,471.04 for tonnage assessments for the years 1943 and 1944.

2. Plaintiff is entitled to a judgment against the defendant in the sum of \$74,471.04 with interest at the rate of 6% per annum on \$34,729.02 of said amount from December 31, 1943 and on \$39,742.02 of said amount from December 31, 1944, together with plaintiff's costs and disbursements herein to be taxed.

3. As orally stipulated by the parties at the trial hereof said judgment is without prejudice to the claims of plaintiff for tonnage assessments due

from defendant subsequent to the year 1944, and said judgment shall so state.

Done in Open Court this 10th day of June, 1946.

LLOYD L. BLACK,
U. S. District Judge.

Copy received June 5, 1946.

EDWARD G. DOBRIN,
For Plaintiff.

J. GORDON GOSE,
DAVID O. HAMLIN,
For Defendant.

[Endorsed]: Filed June 10, 1946. [33]

In the District Court of the United States for the
Western District of Washington, Northern Division

Civil Action No. 895

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST,

Plaintiff,

vs.

GRIFFITHS AND SPRAGUE STEVEDORING
COMPANY, INCORPORATED, a corpora-
tion,

Defendant.

JUDGMENT

This cause having heretofore been tried before the undersigned Judge of the above entitled court upon the facts without a jury, the plaintiff being

represented by its attorneys, Bogle, Bogle & Gates, Edward G. Dobrin and Stanley B. Long, and the defendant being represented by its attorneys, E. M. Hay, David O. Hamlin, McMicken, Rupp & Schweppe and J. Gordon Gose, and the court having found the facts sufficient and having made and entered its Findings of Fact and Conclusions of Law directing the entry of judgment in favor of the plaintiff against the defendant, now, therefore, it is

Ordered, Adjudged and Decreed that the plaintiff have and recover of and from the defendant the sum of \$74,471.04 with interest at the rate of 6% per annum on \$34,729.02 of said amount from December 31, 1943 and on \$39,742.02 of said amount from December 31, 1944, together with plaintiff's costs and disbursements herein taxed at \$237.07. It is further

Ordered, Adjudged and Decreed that the total of this judgment, principal, interest and costs and disbursements, shall bear interest at 6% per annum from the date of entry of this judgment until paid, and that the plaintiff have execution therefor. [34]

It is further Ordered, Adjudged and Decreed that this judgment shall not be a bar to any action by the plaintiff against the defendant for similar claims accruing subsequent to the year 1944, as this judgment by stipulation of the parties applies only to the claims involved for the years 1943 and 1944 and is without prejudice to the rights of the plaintiff to recover from the defendant for tonnage

assessments due from the defendant subsequent to the year 1944.

Done in open court this 10th day of June, 1946.

/s/ LLOYD L. BLACK,

U. S. District Judge.

Presented by:

/s/ EDWARD G. DOBRIN,

Of Attorneys for Plaintiff.

Copy received March 20, 1946.

McMICKEN, RUPP &

SCHWEPPE,

Attorneys for Defendant.

[Endorsed]: Lodged March 20, 1946.

[Endorsed]: Filed June 10, 1946. [35]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that Griffiths and Sprague Stevedoring Company, Incorporated, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the 9th Circuit,

from the final judgment entered in this action on June 10, 1946.

McMICKEN, RUPP &
SCHWEPPE,
J. GORDON GOSE,
EDWARD M. HAY,
DAVID O. HAMLIN,

Attorneys for Appellant, Griffiths and Sprague
Stevedoring Company, Incorporated, a corpo-
ration.

[Endorsed]: Filed July 13, 1946. [36]

[Title of District Court and Cause.]

ORDER APPROVING
SUPERSEDEAS BOND

Defendant having moved for an order approving its supersedeas bond on file herein in the sum of \$89,118.90, both parties appearing by counsel of record, the Court having heard argument and being full advised,

It Is Ordered that the supersedeas bond herein filed by the defendant, Griffiths and Sprague Stevedoring Company, Incorporated, a corporation, secured by a deposit of cash in said amount with Clerk of the above-entitled Court be and the same is hereby approved.

Done in open court this 19th day of July, 1946.

LLOYD L. BLACK,

U. S. District Judge.

Presented by:

DAVID O. HAMLIN,
Of Counsel for Defendant.

Approved as to form:

EDWARD G. DOBRIN,
Of Counsel for Plaintiff.

[Endorsed]: Filed July 19, 1946. [37]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents That Griffiths and Sprague Stevedoring Company, Incorporated, a corporation, as principal, is held and firmly bound unto Waterfront Employers Association of the Pacific Coast, a corporation, in the full and just sum of Eighty-nine Thousand One Hundred Eighteen and Ninety Hundredths (\$89,118.90) Dollars, to be paid to the said Waterfront Employers Association of the Pacific Coast, a corporation, its successors and assigns; to which payment, well and truly to be made, the undersigned binds itself, its successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 13th day of July, 1946.

Whereas, on June 10, 1946, in an action depending in the United States District Court for the Western District of Washington, Northern Division, between Waterfront Employers Association of the Pacific Coast, a corporation, as plaintiff, and

Griffiths and Sprague Stevedoring Company, Incorporated, a corporation, as defendants, a judgment was rendered against the said Griffiths and Sprague Stevedoring Company, Incorporated, a corporation, defendant above named, [38] and the said defendant having filed a notice of appeal from such judgment to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, the condition of this obligation is such, that if the said Griffiths and Sprague Stevedoring Company, Incorporated, a corporation, defendant above named, shall prosecute its appeal to effect and shall satisfy the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Circuit Court of Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

In accordance with the stipulation of the parties and the order of court herein entered July 13, 1946, there is deposited herewith cash in the sum of \$89,118.90 in lieu of a surety.

GRIFFITHS AND SPRAGUE
STEVEDORING COMPANY, IN-
CORPORATED,

[Seal] By F. E. SETTERSTEN,
President.
V. C. SETTERSTEN,
Treasurer.

United States of America,
Western District of Washington,
Northern Division.

On this 13th day of July, 1946, before me personally appeared F. E. Settersten and V. C. Settersten, [39] to me known to be the President and Treasurer, respectively, of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed thereto is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

DAVID O. HAMLIN,

Notary Public in and for the State of Washington,
residing at Seattle.

The foregoing supersedeas bond is hereby approved in open court this day of July, 1946.

District Judge.

Copy received July 13, 1946.

BOGLE, BOGLE & GATES

[Endorsed]: Filed July 13, 1946. [40]

PLAINTIFF'S EXHIBIT 1.

Admitted March 22, 1945

Amended Articles of Incorporation and By-Laws of
Waterfront Employers Association
of the Pacific Coast
Incorporated June 22, 1937

July 25, 1937. [41]

Amended Articles of Incorporation of Waterfront
Employers Association of the Pacific Coast

Know All Men by These Presents:

That a nonprofit corporation is hereby formed under and by virtue of the laws of the State of California, and the persons whose names are hereunto subscribed who are to act in the capacity of first directors of said corporation do hereby certify as follows:

ARTICLE I.

Name.

The name of this corporation shall be Waterfront Employers Association of the Pacific Coast.

ARTICLE II.

Objects.

The said corporation is one which does not contemplate pecuniary gain or profit for its members and is formed for the following purposes and objects:

Plaintiff's Exhibit 1—(Continued)

1. To encourage the establishment and maintenance of fair and reasonable wages and working conditions for longshore work and other work ashore relating to steamship service and, by the establishment and maintenance of harmonious and peaceful industrial relations between employer and employee, to promote dependable and efficient steamship service in the public interest; [42]

2. To fix, establish and maintain on behalf of its members policies in all matters relating to longshore work and other employments ashore at Pacific Coast ports of the United States (except Alaska ports);

3. To represent its members and others in matters relating to the employment of longshoremen and other shore employees at said ports, including the negotiation, execution and performance of contracts with other employers or groups thereof and contracts with groups or associations of longshoremen and other shore employees governing wages, hours and conditions of such employment;

4. To assist, represent and act in behalf of the members and others in connection with any violation of agreements relating to longshore or other employments ashore at said ports, to the end that all such agreements shall be faithfully performed by all parties thereto;

5. To collect, compile and distribute informa-

Plaintiff's Exhibit 1—(Continued)

tion and statistics relating to any of the matters herein;

6. To act on behalf of its members in the development, establishment and maintenance of safe working conditions and rules relating thereto;

7. To purchase, receive, own, manage and control, hold, sell, exchange, mortgage, pledge, hypothecate, convey, lease or otherwise dispose of real and personal property of all kinds and any and every interest [43] therein in connection with the performance of any of the objects or purposes hereinbefore specified, or which may appear conducive thereto;

8. To establish, maintain and operate such offices in the State of California and elsewhere in the United States as may be necessary or appropriate to carry out any of the foregoing objects or purposes;

9. The said corporation shall, in addition to the foregoing objects and purposes, possess the following powers:

(a) To sue and be sued;

(b) To contract and to be contracted with;

(c) To receive property by devise or bequest, subject to the laws regulating the transfer of property by will, and to otherwise acquire and hold all property, real or personal, including shares of stock, bonds and securities of other corporations;

Plaintiff's Exhibit 1—(Continued)

(d) To act as trustee under any trust incidental to the principal objects of the corporation, and to receive, hold, administer, and expend funds and property subject to such trust;

(e) To borrow money, contract debts, and issue bonds, notes and debentures, and secure the same;

(f) To do all other acts necessary or expedient for the administration of the affairs of the corporation and/or the attainment of [44] any of the objects or purposes hereinbefore specified.

10. To act for the foregoing purposes on behalf of all members, either directly or through such agents or instrumentalities as this corporation shall select.

11. No member of this corporation shall be subjected to any personal obligation or liability by any action taken by this corporation unless such action is authorized by these articles of incorporation and is taken in compliance with the provisions of the by-laws of the corporation.

ARTICLE III.

Principal Office.

The county in this State where the principal office of the corporation for the transaction of business is to be located in the City and County of San Francisco.

Plaintiff's Exhibit 1—(Continued)

ARTICLE IV.

Directors.

This corporation shall be governed by a Board of seventeen (17) Directors, and the names and addresses of the seventeen persons who are to act in the capacity of Directors until the election of their successors are as follows:

Names	Addresses
F. J. McGowan	San Pedro, California
T. B. Wilson	Seattle, Washington
K. J. Middleton	Seattle, Washington
A. R. Lintner	Portland, Oregon
Almon E. Roth	San Francisco, California
R. W. Myers	San Francisco, California
F. A. Baily	San Francisco, California
J. E. Cushing	San Francisco, California
F. L. Doekler	San Francisco, California
E. H. Harms	San Francisco, California
J. G. Euson	San Francisco, California
G. Salt	San Francisco, California
E. Wright	San Francisco, California
R. V. Winquist	San Francisco, California
Jas. P. Cribbin	San Francisco, California
E. L. Barges	San Francisco, California
Lloyd Swayne	San Francisco, California

The number of Directors of this corporation may be changed at any time by an amendment to the By-Laws.

Plaintiff's Exhibit 1—(Continued)

ARTICLE V.

Membership.

The classes of membership in this corporation shall be voting members and associate members, and the qualifications for the respective classes of membership in this corporation shall be the following:

Voting Member.

1. Any firm, person, association or corporation regularly engaged in the business of carrying cargo by water to or from any port on the Pacific Coast of the United States (except Alaska ports) or any agent designated by such firm, person, association or corporation shall be eligible for membership as a voting member;

Associate Member.

2. Any firm, person, association or corporation employing longshoremen or other shore employees in any port on the Pacific Coast of the United States (except Alaska port) and any association or corporation [46] composed of employers of such longshoremen or other shore employees or formed to deal with matters relating to such employments shall be eligible for membership as an associate member.

ARTICLE VI.

Voting Power.

The voting power of the members shall be re-

Plaintiff's Exhibit 1—(Continued)

stricted to the voting members. Associate members shall have no voting power whatever. The voting power of the voting members shall be set forth in the By-Laws of the corporation.

In Witness Whereof, the undersigned seventeen persons who are to act in the capacity of Directors of the corporation until the election of their successors have hereunto subscribed their names on this 17th day of June, 1937.

F. J. McGowan

T. B. Wilson

K. J. Middleton

A. R. Lintner

Almon E. Roth

R. W. Myers

F. A. Bailey

J. E. Cushing

F. L. Doeklker

E. H. Harms

J. G. Euson

G. Salt

E. Wright

R. V. Winquist

Jas. P. Cribbin

E. L. Bargones

Lloyd Swayne

By-Laws of
Waterfront Employers Association
of the Pacific Coast

Purposes.

This corporation having been formed for the purposes, among others, of promoting, establishing and maintaining peaceful and harmonious relations between employers and employees engaged or interested in longshore and other employments ashore; of encouraging the establishment of wages,

Plaintiff's Exhibit 1—(Continued)

hours and working conditions fair and just both to employer and employee, and of procuring the honest and faithful observance of all agreements and obligations by all parties concerned, the following by-laws are adopted to regulate the affairs of the corporation and further its said objects and purposes:

ARTICLE I.

Corporate Powers.

The corporate powers, business and property of the corporation shall be vested in and exercised, conducted and controlled by a board of seventeen (17) directors, who need not be members of the corporation. Not less than two of such directors shall be residents of the State of Washington; not less than one, a resident of the State of Oregon, and not less than one shall reside in Southern California. [48]

ARTICLE II.

Ex-Officio Members of the Board.

The Waterfront Employers of Seattle, a corporation, Waterfront Employers of Portland, a corporation, Waterfront Employers Association of San Francisco, a corporation, and Waterfront Employers Association of Southern California, a corporation, shall each be entitled to designate two representatives; one of which shall be selected for his knowledge and experience of stevedoring, the other of terminal or dock operation. It shall be the obli-

Plaintiff's Exhibit 1—(Continued)
gation of all such representatives so designated to attend meetings of the Board of Directors in an advisory capacity only without voting power.

ARTICLE III.

Officers.

The officers of the corporation, none of whom need be members of the Board of Directors, shall consist of a President, one or more Vice-Presidents, a Secretary and Treasurer, and such other offices as the Board of Directors shall from time to time create. All of the officers of the corporation shall hold office at the pleasure of the Board of Directors.

ARTICLE IV.

Powers and Duties of Directors.

The powers and duties of the Board of Directors are:

(a) To appoint and remove at pleasure all officers, agents and employees of the corporation, other than Directors, prescribe such duties for them as may not be inconsistent [49] with law and these by-laws, fix their compensation and require from them, in such cases as the Board may deem appropriate, security for faithful service;

(b) To conduct, manage, and control the affairs and business of the corporation, and to make such regulations therefor, not inconsistent with law and these by-laws, as they may deem best;

Plaintiff's Exhibit 1—(Continued)

(c) To approve and admit to membership persons, firms, associations or corporations qualified therefor under the provisions of the Articles of Incorporation of this corporation and these by-laws; but the Board of Directors shall not admit to membership any firm, person, association or corporation that is managed by, or subsidiary to, or a parent company of any member;

(d) To issue or cause to be issued at any time certificates of membership;

(e) To borrow money and incur indebtedness for the purpose of the corporation, and to cause to be executed and delivered therefor, in the corporate name, promissory notes and other evidence of debt;

(f) To levy and assess and collect, and provide for the collection of, dues or assessments in accordance with the provisions of these by-laws; but the Board of Directors shall not have power to levy, assess or collect dues or assessments in excess of a maximum rate to be fixed, at a regular or special meeting, by the vote of members holding a majority [50] of the voting power of the entire membership;

(g) Generally to transact all of the affairs of this corporation.

Plaintiff's Exhibit 1—(Continued)

ARTICLE V.

Labor Practice.

No contract, commitment or undertaking which would impose any personal obligation or liability on the members of this corporation shall be made or entered into by this corporation unless and until the same shall first have been authorized or accepted in writing by the member or members to be bound thereby, or has been approved, at any regular or special meeting of the members, by vote of members holding a majority of the voting power of the entire membership, or unless such contract, commitment or undertaking shall have been made or entered into by this corporation pursuant to a delegation of authority conferred by a similar vote.

Liability of Members.

A member who has not authorized or accepted in writing, such contract, commitment or undertaking and who has not voted in favor of the approval thereof, or the delegation of authority with respect thereto, shall not be bound by such contract, commitment or undertaking if such member resigns within seven days after the date of the vote thereon.

No member becoming bound in respect of any contract, commitment or undertaking made by this corporation shall be under any [51] liability with respect to any act taken or omitted thereunder by any other member.

Plaintiff's Exhibit 1—(Continued)

ARTICLE VI.

Resignations and Vacancies in the
Board of Directors.

Section 1. Whenever any vacancy occurs in the office of directors, such vacancy may be filled by an appointee selected by a majority of the remaining directors, although less than the quorum hereinafter specified in Section 3 of Article XIII, and the person so appointed shall hold office until his successor is elected. In case of an increase in the number of directors, the Board of Directors shall have power to fill the new positions, and their appointees shall hold office until the next election of directors by the members, or until their successors have been elected.

Sec. 2. A vacancy in the Board *if* Directors shall be deemed to have occurred whenever a director resigns, which he may do either by presenting his written or oral resignation to the Board or by mailing or telegraphing his resignation to the corporation, or whenever a director dies, or by judgment of a competent court is declared incompetent or insane, or whenever any vacancy is created in accordance with any law of the State of California. Unless otherwise provided herein, any such resignation shall become effective when presented, mailed or telegraphed as aforesaid.

ARTICLE VII.

Election of Directors.

The directors shall be elected annually by the

Plaintiff's Exhibit 1—(Continued)

members at the annual meeting of the [52] members. Their term of office shall begin immediately after election and shall continue until the next annual meeting of the members or until their successors are elected. At all elections a majority of the voting power of the members shall be represented either in person or by proxy in writing.

ARTICLE VIII.

Executive Committee.

The Board of Directors may from time to time appoint an Executive Committee consisting of the President and seven (7) directors. The Board of Directors shall likewise have power to create and appoint such other committees as it may determine from time to time. All of the members of said executive committee and any such other committee shall hold office at the pleasure of the Board of Directors. The Board of Directors may delegate to the executive committee any of the powers and authority of the Board in the management of the business and affairs of the corporation except the power to declare dividends and levy dues or assessments.

ARTICLE IV.

President.

The powers and duties of the President are:

(a) To preside at all meetings of the Board of Directors and of the members;

Plaintiff's Exhibit 1—(Continued)

(b) To call special meetings of the members and also of the Board of Directors, at such times as he may deem proper; [53]

(c) To sign as President of the corporation all deeds, conveyances, mortgages, leases, promissory notes, contracts, obligations, certificates and other papers and instruments in writing that may require such signature, unless the Board of Directors shall otherwise direct, and to perform such other duties as the Board of Directors may determine.

(d) The President shall be a member and serve as ex-officio chairman of the Executive Committee and all other committees.

ARTICLE X.

Vice-Presidents.

The Vice-Presidents shall, in the event of the absence or disability of the President, perform the duties and exercise the powers of the President, and shall perform such other duties as the Board of Directors shall from time to time prescribe.

ARTICLE XI.

Secretary and Treasurer.

The powers and duties of the Secretary and Treasurer are:

(a) To keep a full and complete record of the proceedings of the Board of Directors, meetings of the members, and of all committee meetings;

Plaintiff's Exhibit 1—(Continued)

(b) To keep the seal, books and papers of the corporation, and to affix the seal to all instruments executed by the President, or by direction of the Board of Directors, which may reasonably require it;

(c) To sign, in conjunction with the [54] President, or any Vice-Presidents, all certificates of membership, checks, drafts, promissory notes and other documents unless the Board of Directors shall otherwise direct;

(d) To receive any moneys belonging to or paid into the corporation and to receipt for the same, and to deposit all funds with such depository as the Board of Directors may designate;

(e) To make service and publication of all notices that may be necessary or proper, and without command or direction from anyone. In case of the absence, inability, refusal or neglect of the Secretary to make service or publication of any notice, then such notice may be signed, served and published by the President or any Vice-President, or by any person thereunto authorized by any of them, or by the Board of Directors;

(f) To supervise the keeping of the accounts and of the books of the corporation;

(g) Generally to do and perform all such duties as pertain to his office and as may be required by the Board of Directors, or by the President.

Plaintiff's Exhibit 1—(Continued)

ARTICLE XII.

Membership Meetings—Annual Meeting.

Section 1. There shall be a regular annual meeting of the members of the corporation on the 2nd Wednesday in February of each year beginning with the year 1938, at 2:00 o'clock p.m. of said day, at the office of the corporation; provided, however, that [55] should said meeting day fall upon a legal holiday, said meeting of the members shall be held on the next day thereafter which is not a legal holiday, at the same hour and place. At said regular meeting, directors of the corporation shall be elected to serve for the ensuing year, and until their successors are elected. Notice of the annual meeting of members, and of the election of directors thereat, shall be given by mailing notice thereof stating the nature of the business to be transacted at least five days prior to the date of meeting, addressed to each of the members of the corporation at his or its place of business or residence as the same appears on the books of the corporation, or, in case no business or residence address of a member appears on the books of the corporation, then directed to any address appearing on the books for such member. No other or further notice shall be required.

Special Meetings.

Sec. 2. Special meetings may be called and held at any time by order of the President or four (4) members of the Board of Directors, or ten (10)

Plaintiff's Exhibit 1—(Continued)

members of the corporation, by notice, stating the nature of the business to be transacted at the meeting, given in either of the two following manners:

1. By a four days' notice in writing given to all members in the manner provided in Section 1 of this Article; or

2. By notice transmitted to the place [56] of business of each member by telephone or telegraph at lease twenty-four (24) hours prior to the hour fixed for said meeting.

The latter form of notice shall be given only if the President or four (4) members of the Board of Directors or ten (10) members of the corporation, shall determine that an emergency exists requiring an immediate meeting of the members.

Sec. 3. It shall be the duty of the Secretary, upon demand of the President or four members of the Board of Directors or ten members of the corporation, to prepare and send notice of any special meeting to each member of the corporation in accordance with Section 2 of this Article.

Quorum Members.

Sec. 4. At all meetings of the members, persons representing a majority of the voting power of the membership, either in person or by proxy in writing, or by telegraph, shall constitute a quorum.

Voting Power.

Sec. 5. Each voting member shall have one vote

Plaintiff's Exhibit 1—(Continued)

and in addition one vote for each full 100,000 tons of cargo loaded and/or discharged by or for such member during the preceding calendar year at all Pacific Coast ports of the United States (except Alaska ports) to or from vessels owned, operated or managed by such member. The voting power of agent members shall be determined in the same manner as if the principals for whom such agents are acting were [57] themselves members. Associate members shall have no voting power. The Board of Directors shall have power by resolution to establish general rules for the purpose of ascertaining and determining tonnage for voting purposes. Each member shall report to the Secretary of this corporation on or before the 20th day of each month the tonnage of all cargo loaded or discharged by or for such member as aforesaid at all Pacific Coast ports of the United States (except Alaska ports) during the preceding calendar month, agent members reporting separately the tonnage so loaded or discharged on behalf of the principals on whose behalf they are acting as members. The Secretary of this corporation shall certify to the Board of Directors in advance of the annual meeting the tonnage of cargo loaded and/or discharged by each voting member during the preceding calendar year and the tonnage of cargo loaded and discharged by principals on whose behalf agent members are then acting during such preceding year, and before the annual meeting, the Board of Directors shall consider such report of the Secretary and from said

Plaintiff's Exhibit 1—(Continued)

report and any other source that the Board shall deem appropriate, shall determine the tonnage of cargo so loaded and/or discharged by each member for voting purposes, and said determination shall be final and conclusive upon all members for the ensuing year.

The voting power of all voting members [58] until the annual meeting of 1938 and of all new voting members until the annual meeting of the year following admission to membership shall be determined by the tonnage of cargo loaded and/or discharged by it or on its behalf at all of said ports during the preceding calendar year, the voting power of agent members being determined in the same manner as if the principals on whose behalf they are acting were themselves members; and such tonnage for voting purposes until the annual meeting in 1938, and thereafter from year to year for such new members shall be conclusively determined by the Board of Directors by reference to such sources of information as it shall deem proper.

Cumulative Voting.

Sec. 6. Every member entitled to vote at any election for directors shall have the right to cumulate his votes and give one candidate a number of votes equal to the number of directors to be elected multiplied by the number of votes to which such member is entitled or to distribute his votes on the same principal among as many candidates as he shall think fit. The candidate receiving the highest

Plaintiff's Exhibit 1—(Continued)

number of votes up to the number of directors to be elected shall be elected.

ARTICLE XIII.

Directors' Meetings.

Section 1. Meetings of the Board of Directors shall be held either at the office of the corporation or at any other place which may be designated by resolution of the [59] Board of Directors. Regular meetings of the Board of Directors shall be held on the 2nd Wednesday of each February, May, August and November at 10:00 a.m., without other or further notice than this by-law; provided, however, that should said meeting day at any time fall upon a legal holiday such meeting shall be held the next day thereafter which is not a legal holiday at the same hour and place.

Special Directors' Meetings.

Sec. 2. Special meetings of the Board of Directors may be called at any time by order of the President or any Vice-President of the corporation or four directors. Notice of a special meeting of the Board of Directors shall state the nature of the business to be transacted and be given each director by mailing notice thereof, at least four days prior to the date of meeting, addressed to each director at his place of business or residence as the same appears on the books of the corporation, or, in case no business or residence address of such director

Plaintiff's Exhibit 1—(Continued)

appears on the books of the corporation then directed to any address appearing on such books for such director.

Emergency Directors Meetings.

In the event that the President or any Vice-President of the corporation, or any four directors thereof, shall determine that an emergency exists requiring an immediate meeting of the said Board of Directors, notice thereof may given not less than twenty-four (24) hours prior to the hour set for said meeting by notice transmitted to the [60] place of business of each director either by telephone or telegraph. No notice other or further than that specified in this Section shall be required. Anything which may be done at a regular meeting of the Board of Directors may be done at a special or an adjourned meeting of the Board.

Quorum Directors.

Sec. 3. Except as otherwise provided in Section 1 of Article VI hereof, a majority of the total authorized number of directors shall constitute a quorum at all directors' meetings.

Organization of Board.

Sec. 4. The Board of Directors elected at any annual meeting of the members shall meet immediately after the adjournment of such members' meeting and organize by the election of officers. No notice of such meeting need be given.

Plaintiff's Exhibit 1—(Continued)

Sec. 5. At any meeting of the Board of Directors every act or decision done or made by a majority of the directors present shall be regarded as the act of the Board of Directors. In the absence of a quorum a majority of the directors present may adjourn from time to time until the time fixed for the following regular meeting of the Board.

ARTICLE XIV.

Meetings of Executive Committee

The Executive Committee shall have power to establish rules governing its own proceedings including the establishment of the place of meeting, any regular time of meeting, and other rules governing its own procedure. Minutes shall be kept of all proceedings [61] of the Executive Committee, which shall be incorporated in and become a part of the minutes of the Board of Directors.

ARTICLE XV.

Initiation Fees.

From and after a future date to be fixed by the Board of Directors, each new member shall pay an initiation fee. Said initiation fee shall be not less than Two Hundred Fifty Dollars (\$250.00) and shall be such amount as may be required to insure a contribution to the assets of the corporation which will bear to the corporation's current assets a proportion substantially equivalent to the voting power of the new voting member; and the Board shall take

Plaintiff's Exhibit 1—(Continued)

into consideration any indirect contributon to such assets already made. Associate members shall not be required to pay any initiation fee unless otherwise directed by the Board of Directors.

ARTICLE XVI.

Dues and Assessments.

In fixing all dues and levying all assessments, the Board of Directors shall determine the amount to be paid by each member per ton of cargo loaded and/or discharged at each United States Pacific Coast port (except Alaska ports). In fixing dues and levying assessments, the Board of Directors, may establish different rates per ton for different classes of cargo and different rates per ton applicable to the different loading, discharging or handling conditions, and the Board of Directors shall also fix rules for calculation of the tonnage loaded, discharged [62] and/or handled by the members thereof, and all rules so established by the Board of Directors shall be applied uniformly among the members. The determination of the Board of Directors of rules for the determination of tonnage rates and classifications thereof, and for the calculation of tonnage, shall be final and conclusive.

Notice of any action taken by the Board of Directors with respect to dues or assessments shall be sent to the members promptly by registered mail and shall not become effective until seven days after such mailing. No member who resigns from the cor-

Plaintiff's Exhibit 1—(Continued)

poration prior to the effective date of such action shall be bound thereby.

ARTICLE XVII.

Admission to Membership.

No firm, person, association or corporation shall become a member of this corporation, unless and until it shall have been approved for such membership by a vote of not less than a majority of the Board of Directors and unless the applicants shall be qualified for membership in accordance with the provisions of the articles of incorporation of this corporation and of these by-laws.

ARTICLE XVIII.

Duties of Members.

Section 1. This corporation shall have power to establish policies for its members and the corporation in all matters relating to labor contracts and labor controversies and shall have power to represent and act on behalf of its members in any negotiations [63] carried on by the corporation on behalf of its members with unions of longshoremen or other employments ashore and, subject to the provisions of Article V of these by-laws, any contracts, commitments or undertakings made by this corporation on behalf of its members with any union shall bind the members of this corporation.

Violations of Contracts.

If any member shall violate, directly or indirectly,

Plaintiff's Exhibit 1—(Continued)

any rule of policy established by this corporation, or procure, encourage or assist in any such violation by any other person, whether a member of this corporation or not, or shall, directly or indirectly, violate any provision of any contract or agreement made by the corporation on its behalf with any longshoremen or other employments ashore or unions thereof, or procure or encourage or assist in any such violation by any other person, whether a member of this corporation or not, or shall violate any other provision of this section or of these by-laws, then, in any such event, the Board of Directors shall have the power, in its discretion, to suspend any such member for such period of time as the Board of Directors shall prescribe or to expel such member from membership in this corporation.

Suspension.

Sec. 2. If any union, its members or officials, shall violate any labor contract or award relating to wages, hours or working conditions to which agreement or award this corporation or any of its members is a party, whether by strikes, stoppages of work or in [64] any other manner, any member affected thereby shall notify the corporation. All appropriate means for peaceful settlement of any such matter shall be pursued with the appropriate officers of the union or unions involved in an endeavor to secure compliance with the terms of such agreement or award. If compliance is not secured, a meeting of the members of this corpora-

Plaintiff's Exhibit 1—(Continued)

tion shall forthwith be called and all members of this corporation shall take whatever action shall be determined by a vote of members holding at least a majority of the voting power of the membership, provided that there shall be no suspension or termination of any such contract or agreement for breach thereof without the consent of members representing at least two-thirds of the voting power of the entire membership. Provided further that written notice of any such vote or consent shall be immediately given by registered mail to all members and no such vote or consent shall bind any member who did not join therein and who resigns within seven days after the date of mailing of such notice.

ARTICLE XIX.

Resignation.

Any member may resign by submitting its written resignation at any meeting of the Board of Directors or of the members, or by mailing or telegraphing its resignation to the corporation; and thereupon such resignation, without the necessity of any acceptance, shall become effective forthwith [65] unless otherwise specified therein, provided, however, that no such resignation shall become effective until full payment of all arrears for dues and assessments to which such member has become liable. In the event that any member shall resign from membership in this corporation or shall be expelled from membership therein, all interest of

Plaintiff's Exhibit 1—(Continued)

such member in this corporation or in any of its property shall forthwith cease and terminate, provided, however, that no such resignation or expulsion and no suspension from membership in this corporation shall terminate or affect any liability of such member which may have heretofore accrued, nor affect any obligation of such member under or pursuant to the terms of any labor contract or agreement theretofore made or entered into on its behalf by this corporation. The Board of Directors shall likewise have power to impose any penalties or other conditions to the readmission of any such former member to membership in this corporation, or to the termination of any suspension of any member.

ARTICLE XX.

Financial Assistance to Members.

If any labor union or association of working men or any members of any such union or association shall violate any agreement with this corporation, or with any member thereof, or shall refuse to work for any member or members of this corporation, the Board of Directors shall, upon application, [66] cause investigation to be made, and if the Board of Directors shall find that such union or association is at fault, and fails or refuses to make reparation or otherwise remedy such violation or refusal to the satisfaction of the Board of Directors, and if this corporation after investigation shall desire to resist the demands of such union or member thereof,

Plaintiff's Exhibit 1—(Continued)

this corporation shall render to such member or members of this corporation the fullest moral support, and shall pay such expenses incurred by such member in any strike, lockout or other labor trouble caused by such action of the union, association or member or members thereof, as shall be approved and limited by the Board of Directors of this corporation in advance. No personal obligation or liability on the part of any member of the corporation shall accrue under this Article XX or by virtue of any action taken by the corporation hereunder, provided that the foregoing shall not be deemed to affect the power of the Board of Directors to levy assessments in the manner provided in Article XVI of these by-laws for the purpose of rendering assistance to members as permitted by Article XX.

ARTICLE XXI.

Final Distribution of Assets.

Upon the dissolution of this corporation, after paying or adequately providing for the debts and obligations of the corporation, the remaining assets, if any, shall be divided among the voting members, as follows: Each [67] voting member shall receive that proportion of the assets which the total amount of dues and assessments assessed upon and paid by such voting member to the corporation during the preceding calendar year shall bear to the total amount of such dues and assessments assessed upon and paid by all voting members during the same

Plaintiff's Exhibit 1—(Continued)
year. Associate members shall not participate in
the assets of this corporation on dissolution.

ARTICLE XXII.

Amendments.

These by-laws may be amended at any regular or
special meeting of the members in the notice of
which the substance of the proposed amendment has
been stated, by the vote of members holding two-
thirds of the voting power of the entire member-
ship. [68]

PLAINTIFF'S EXHIBIT 2

Admitted March 22, 1945.

WATERFONT EMPLOYERS OF WASHINGTON

Amended Articles of Incorporation
and By-Laws

Incorporated 1934

February 23, 1940 [70]

Amended Articles of Incorporation

Known All Person by These Presents:

That the undersigned incorporators, being six in
number, desiring to create a non-profit corporation
under the laws of the State of Washington (R. R.

Plaintiff's Exhibit 2—(Continued)

S. Secs. 3888-3900) do hereby prepare, execute and acknowledge Articles of Incorporation:

ARTICLE I.

The name of the corporation shall be "Waterfront Employers of Washington."

ARTICLE II.

The life term of the corporation shall be forty-nine years.

ARTICLE III.

The principal office of the corporation shall be in the city of Seattle, county of King, state of Washington.

ARTICLE IV.

The purposes and powers of the corporation shall be:

1. To function as an intermediary between employers and employees, directly or indirectly concerned in the commercial movement and handling of goods;
2. To assist warehousemen, wharfingers and carriers of goods by water, rail or auto, in hiring and retaining ample, reliable and competent supply of labor; and to assist individual laborers in promptly and conveniently securing suitable jobs under satisfactory conditions at available wages; [71]
3. To establish, operate and maintain offices and employment halls for the centralization of informa-

Plaintiff's Exhibit 2—(Continued)

tion, registration and distribution of jobs and laborers;

4. To establish, operate and maintain places and means of housing, feeding, protecting and amusing laborers during time off the job;

5. To establish, operate and maintain regular or intermittent lines of expeditious transportation of and for laborers to and from job locations;

6. To encourage efficient and safe conditions during time on the job;

7. To compile and preserve statistical records as to laborers, jobs, earnings, costs, conditions of work, causes of accidents, safety practices, personal injury compensation, and other data;

8. To formulate advisory policies or rules for promotion of cooperative relationship between employers and employees; to publish and circulate trade reports and statistical material;

9. To render and perform any lawful service or function beneficial to waterfront industries, linking land and water commerce;

10. To create, regulate and terminate memberships in the corporation, all of which shall be equal as to vote, authority and interest in the affairs and assets of the corporation, none of which shall be subject to any assessment or liability, other than or in excess of initial membership fees and periodic dues; and to issue, alter and cancel membership certificates;

Plaintiff's Exhibit 2—(Continued)

11. To employ and discharge all agents and servants at will;

12. To do anything permissible under the statutes of the State of Washington concerning non-profit corporations;

13. To do anything reasonably implied by or incidental to any purpose or power above mentioned. [72]

ARTICLE V.

The Trustees of the corporation shall manage its affairs and exercise its powers, except as otherwise provided by the statutes of the state of Washington or by the corporate By-Laws.

The Trustees shall not be more than twelve in number, subject to decrease or increase by consent of two-thirds of the membership of the members to not less than three or more than twelve. The Trustees shall be chosen and removed as determined by the corporate By-Laws, provided that for the organization period of not less than two months nor more than six months, the initial Trustees shall be the following persons: Dean D. Ballard, H. W. Burchard, W. C. Dawson, E. A. Quigle, K. Sawai, H. A. Shook, W. D. Vanderbilt, W. F. Varnell and C. B. Warren

ARTICLE VI.

The corporation shall possess a seal, to be adopted

Plaintiff's Exhibit 2—(Continued)
and used as required by the By-Laws, the design of
which shall include its corporate name.

ARTICLE VII.

Amendments, not inconsistent with the non-profit classification of the corporation, may be made to these Articles of Incorporation, as authorized by the statutes of the State of Washington.

In Witness Whereof, the incorporators have subscribed their names, hereby adopting the foregoing Articles of Incorporation, upon this 15th day of June, 1934, at Seattle.

W. D. VANDERBILT

H. A. SHOOK

E. A. QUIGLE

H. W. BURCHARD

K. SAWAI

W. C. DAWSON [73]

State of Washington,
County of King—ss.

On this day personally appeared before me Dean D. Ballard, H. W. Burchard, W. C. Dawson, E. A. Quigle, K. Sawai, H. A. Shook, W. D. Vanderbilt, W. F. Varnell and C. B. Warren, to me known to be the individuals described in and who executed the foregoing instrument, and each for himself acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Plaintiff's Exhibit 2—(Continued)

Given under my hand and official seal this 15th day of June, 1934.

[Seal] LANE SUMMERS,
Notary Public in and for the State of Washington,
residing at Seattle. [74]

Amended By-Laws

Whereas, Articles of Incorporation of Waterfront Employers of Washington, a non-profit corporation of the State of Washington, have heretofore been prepared, executed and acknowledged, and also have heretofore been filed as provided by law;

Whereas, the undersigned, being all the incorporators and all the members of said corporation, have assembled together in a meeting (prior to transaction of business and acquisition of property), and after due deliberation have adopted, by unanimous vote, corporate by-laws;

Now, Therefore, such By-Laws, being written, recorded and subscribed within this book pursuant to statutory requirements, are as follows:

1. That the initial Trustees of the corporation, named in its Articles of Incorporation, shall, immediately following the adoption of these By-Laws, and pursuant hereto, perfect the organization, and elect officers to serve until their successors are elected and qualified. That the provisions of these By-Laws shall apply to such initial officers.

Plaintiff's Exhibit 2—(Continued)

2. That this corporation shall exist and function without profit.

3. That this corporation shall have no capital stock, no stock shares or stock dividends.

4. That this corporation shall be composed solely of members, being individuals, copartnerships or corporations directly or indirectly engaged as employers of labor in commercial transportation or handling of goods by or over water, rail, truck, docks or warehouses.

5. That the interest of each member (whether becoming such contemporaneously with or subsequent [75] to incorporation) shall be equal to that of any other; and no member shall acquire any greater voice, right, vote, authority or interest than any other.

6. That membership shall be created as the result of the following:

(a) Election by a majority vote of all trustees or of all members, evidenced by resolution in meeting, or by signed writing circulated without meeting;

(b) Subscription to these By-Laws.

(c) Payment of initiation fee.

7. That membership shall be evidenced by a certificate, issued by the corporation over its seal and the signature of the President or Secretary, which shall expressly specify that such membership is

Plaintiff's Exhibit 2—(Continued)

subject to no assessment or liability other than or in excess of initial membership fees and periodic dues; that membership certificate shall be in substantially the following form:

“Waterfront Employers of Washington
Membership Certificate

Know All Persons:

That, upon election, having subscribed to the By-Laws and paid the initial fee, now is a member of Waterfront Employers of Washington, a non-profit corporation of the State of Washington, with all rights and obligations of membership, the same not being subject to any assessment or liability other than or in excess of initial membership fee and periodic dues.

In Witness Whereof, this certificate has been issued day of, 19..., at Seattle.

.....
President-Secretary.”

8. That all members in good standing shall have the right to resort to the corporation for services within the scope of its operations. [76]

9. That all members shall be obligated to pay an initiation fee in the sum of \$10.00, and to pay uniform periodic dues in the amount and at the time as required by the Trustees.

10. That no member, delinquent for more than

Plaintiff's Exhibit 2—(Continued)

thirty days in the payment of dues, shall be in good standing during such delinquency.

11. That any member not in good standing for failure to pay dues shall be subject to expulsion by a majority vote of all Trustees or of all members. That written notice by the corporation of such expulsion to the member shall operate automatically in cancellation of membership certificate. That any member may terminate membership by voluntary withdrawal. That all memberships shall be cancelled by death, dissolution or adjudicated insolvency. Termination of membership shall not relieve the member from obligation to pay due previously accrued.

12. This corporation shall have power to establish policies for its members and the corporation in all matters relating to labor contracts and labor controversies and to the enforcement and performance thereof and shall have power to represent and act on behalf of its members, either itself or through other agencies to be designated by the Trustees, in any negotiations with unions of longshoremen or other employees ashore, and any contracts, commitments or undertakings made on behalf of the members of this corporation pursuant to the provisions hereof with any union shall bind the members of this corporation. If any member shall violate, directly or indirectly, any rule or policy established by this corporation, or procure, encourage or assist any such violation by any other person, whether a

Plaintiff's Exhibit 2—(Continued)

member of this corporation or not, or shall, directly or indirectly, violate any provision or agreement made by the corporation on its behalf with any longshoremen or other shore employees or unions thereof, or procure, encourage, or assist in any violation by any other person, whether a member of this [77] corporation or not, or shall violate any other provision of this section or of these By-Laws, then, in any such event, the Trustees shall have the power, in their discretion, to suspend any such member for such period of time as the Trustees shall prescribe, or expel such member from membership in this corporation, provided, however, that no such suspension or expulsion shall in any manner terminate or affect any liability of such member to this corporation which may have theretofore accrued.

13. That any member in good standing may assign his membership to any assignee, qualified in the discretion of the Trustees, by signed endorsement upon the membership certificate, such assignment, however, not to be effective as to the corporation until the assignee has subscribed to these By-Laws, and until the original membership certificate has been relinquished and cancelled and a substitute certificate issued.

14. That annual meetings of the members shall be held on the last Thursday of January, the hour and location of such meetings to be designated by the President, and notice sent members sufficiently

Plaintiff's Exhibit 2—(Continued)

in advance to permit attendance. That special meetings of the members shall be held as called by the President, any two Trustees, or any three members by written notice specifying the time and place of such meeting sufficiently in advance to permit attendance. That at meeting of the members, a majority of the membership shall constitute a quorum for the transaction of business. That any number shall be sufficient to authorize an adjournment to a specified time and place for lack of a quorum.

15. That trustees shall be nominated by a committee of three appointed by the Board of Trustees. They shall nominate double the number of trustees required from among duly qualified members. Of those nominated, the fifty per cent receiving the highest number of votes shall be declared duly elected Trustees. Nominations shall be submitted to the membership on or before [78] December 15th of each year by secret ballot and the polls shall be closed as of December 31st. That Trustees so elected shall serve as such to manage the affairs and exercise the powers of the corporation for the period of one year and until their successors are elected and qualified.

16. That vacancies among the Trustees caused by death or resignation may be filled by majority vote of the remaining Trustees until the next annual meeting of members; that such vacancies caused by removal by the members may be filled by majority

Plaintiff's Exhibit 2—(Continued)

vote of the members until the next annual meeting thereof.

17. That the Trustees of the corporation shall manage its affairs and exercise its powers, subject to such limitations as are imposed by law, and as may hereafter be imposed from time to time by the members in annual or special meetings.

18. That no person shall be eligible to election and service as a trustee of the corporation unless he shall be an individual member, or unless he shall be connected with a copartnership or corporate member in some responsible, representative capacity; no person shall be qualified as a trustee until he shall have subscribed to an oath, obligating him to support the constitution and laws of the State of Washington, and to faithfully perform his duties as trustee.

19. That special meetings of the Trustees may be called informally at any time and place by the President of the corporation, or by any two Trustees, upon written or oral notice, specifying the time and place of such meeting, sufficiently in advance to permit attendance. That a majority of the Trustees, in attendance at any annual or special meeting, shall be sufficient for the transaction of business. That any number shall be sufficient to authorize an adjournment to a specified time and place for lack of a quorum.

20. That the Trustees as such shall receive no compensation. [79]

Plaintiff's Exhibit 2—(Continued)

21. That at the Annual Meeting of the Trustees, which is to be held on the last Thursday of January, immediately following the membership meeting, or adjournment thereof, the Trustees shall elect officers of the corporation to serve as such and perform their respective duties for a period of one year and until their successors are elected and qualified.

22. That vacancies in any office, by death, resignation or removal, may be filled by majority vote of the Trustees until the next annual meeting of Trustees.

23. That the officers of the corporation shall consist of a President, a Vice-President, a Treasurer and a Secretary. That the eligibility requirements of the Trustees shall not be applicable to officers; that the Trustees may elect one person to serve in more than one office.

24. That the Trustees may from time to time create and abolish other offices, and may specify or alter the duties of any office.

25. That the President of the corporation, if in attendance, shall preside at all meetings of the Trustees and of the members; he shall be authorized to sign all membership certificates, to execute in the name of the corporation all contracts and obligations within the scope of its ordinary operations, without special authorization from the Trustees; he shall, with the approval of the Trustees, appoint and remove all staff personnel, including

Plaintiff's Exhibit 2—(Continued)

agents, and designate their duties and authority; and he shall likewise fix their compensation; he shall perform such other duties as may be expressly or impliedly required by these By-Laws or prescribed by the Trustees; he shall generally do and perform the duties usually devolving upon an officer of like capacity.

That the Vice-President of the corporation, in the absence of the President, shall have the same authority and responsibility as the President.

26. That the Treasurer of the corporation shall keep, or cause to be kept, full and complete records [80] and books of account, concerning the finances of the corporation; he shall have authority to open and maintain accounts of deposit with one or more responsible banks; to receive and disburse, by check or otherwise, all moneys of the corporation in its routine operation without special authorization from the Trustees, and he shall generally do and perform those duties usually devolving upon any officer of like capacity.

27. That the Secretary of the corporation shall attend the meetings of the Trustees and the members; he shall keep accurate minutes and records of such meetings; he shall be custodian of the seal of the corporation, and, without special authority of the Trustees, affix the same with his signature or the signature of the President to membership certificates and any contracts customarily requiring such seal; he shall be the custodian of the corporate

Plaintiff's Exhibit 2—(Continued)

records; he shall supervise all statistical research and compilations thereof; he shall keep a correct and accurate record of all memberships, the issuance, assignment and termination thereof; he shall generally do and perform those duties usually devolving upon an officer of like capacity.

28. That the officers of the corporation shall or shall not receive compensation, in the discretion of the Trustees, who shall fix the amount of any compensation allowed, and increase or decrease the same.

29. That the Trustees shall exercise care in fixing from time to time the rate of the uniform periodic membership dues, so that the aggregate thereof shall be equivalent to the original and maintenance cost of the properties, facilities, equipments, supplies and services of the corporation, as prescribed by the Trustees; that, nevertheless, the Trustees may create a reserve surplus fund within the limits permitted by law, from which to meet anticipated cost of necessary major investments in properties, facilities or equipment, to cover current expenses during periods [81] when the aggregate of dues is insufficient to defray the same and to meet emergency outlays.

That dues as fixed by the Trustees shall never be made to operate retroactively.

That contributions by members to ordinary or extraordinary expenses shall be credited to such

Plaintiff's Exhibit 2—(Continued)

members upon their dues, such credit to be allowed as determined by the Trustees.

30. That refund, if any, of surplus or dues shall be made only upon a two-thirds vote of all members at the time and in the manner specified by resolution thereof.

31. That in harmony with the phraseology of membership certificate, no membership shall be subject to assessment or liability other than or in excess of initial membership fees or periodic dues.

32. That all notices (whether written or oral) required in these By-Laws, shall be sufficient and regular, if mailed, delivered or made to the usual office or abode of the member or trustees, as published in the city or telephone directory of his place of residence, or as known to the officers of the corporation: provided, however, that reasonable effort shall be exerted to convey actual notice, if the member or trustee be available within the city of Seattle.

That at annual or special meetings of members or trustees, any lawful business may be transacted without disclosure of the purpose of such meeting, except only as herein otherwise provided.

33. That no meeting of Trustees shall be requisite to any resolution or authorization, if the same shall be approved in writing over the signature of all Trustees.

34. That the seal of the corporation shall carry

Plaintiff's Exhibit 2—(Continued)

its name, "Waterfront Employers of Washington," together with the words "Corporate Seal, 1934, State of Washington." [82]

35. That amendment may be made to the Articles of Incorporation and/or these By-Laws, and dissolution of the corporation may be effected only by the members. That the Articles of Incorporation and/or these By-Laws may be amended by a two-thirds vote of all members, at any meeting, annual or special, notice of which has disclosed such purpose.

36. Upon the dissolution of this corporation, after paying or adequately providing for the debts of the corporation, the remaining assets, if any, shall be divided among the members as follows: Each member shall receive that proportion of the remaining assets which the contributions paid by him during the two years immediately preceding the date of dissolution bear to the total amount of contributions paid by all members during the said period.

In Witness Whereof, all incorporators and subsequent members of the corporation have subscribed their names and listed their addresses to the foregoing By-Laws at Seattle, Washington.

W. D. VANDERBILT H. W. BURCHARD

H. A. SHOOK

K. SAWAI

E. A. QUIGLE

W. C. DAWSON [83]

PLAINTIFF'S EXHIBIT 3-A

Offered by Defendant. Admitted Mar. 27, 1945

Copy of Resolution of July 31, 1937

1. That the expense of collective reporting and Central Pay Offices be assessed on a payroll basis against the participating employers of longshore or other labor handled through the Central Bureaus, and that this function be administered by the local port associations.

2. That one assessment to cover all other activities of both the Coast Association and the local port associations be levied upon the following basis:

'Off-shore and Intercoastal Cargo:

General cargo 2c per manifest ton

Lumber 2c per M ft.

Bulk cargo dry 4c per ton

(Bulk fluid cargo exempt)

Transshipped cargo $1\frac{1}{2}$ rate of foregoing

(Each vessel)

Coastwise cargo:

$\frac{1}{2}$ off-shore rates paid in and out (when handled by crew and longshoremen), tonnage to be taxed is to be calculated proportionate to man-hours of longshoremen and crew actually handling cargo.

Operators who are not members of either individual port association or the Coast Association:

$2\frac{1}{2}$ c per man per hour.

3. That budgets covering all activities conducted

in the local ports, other than collective reporting and Central Pay Offices, be set up by local port authorities, subject to the approval of the Directors of the Coast Association.

4. That all assessments other than those in support of collective reporting and Central Pay Offices be collected by the Coast Association, and that out of the income derived therefrom a sum sufficient to meet the port budgets be allocated to the individual port association.

5. That the fiscal year for the Coast Association be fixed as a period from January 1st to December 31st; that it be recommended that each port association adopt the same fiscal year.

6. That the budgets for the port associations and the budget for the Coast Association be referred to the Executive Committee for consideration and approval, with the understanding that budgets now approved will continue until December 31st, 1937, at which time new budgets for the fiscal year 1938 be presented for consideration of the Board of Directors of this Association. [84]

PLAINTIFF'S EXHIBIT 5

Admitted March 22, 1945

May 11, 1938

“Whereas, the present rate of assessment of the Waterfront Employers Association of the Pacific Coast has been insufficient to meet expenses, and it

being determined that additional income will have to be raised for this purpose, now

“Therefore Be It Resolved, That effective June 1st, 1938, the rate of assessment levied on all cargo loaded and/or discharged at Ports on the Pacific Coast of the United States (except Alaska ports) be as follows:

Off-shore and Intercoastal Cargo:

General cargo $21\frac{1}{2}$ c per manifest ton

Lumber $21\frac{1}{2}$ c per M feet

Bulk cargo dry 5/10c per ton

(Bulk fluid cargo exempt)

Transshipped cargo ... $1\frac{1}{2}$ rate of foregoing
(Each vessel)

Coastwise Cargo:

$1\frac{1}{2}$ off-shore rates paid in and out (when handled by crew and longshoremen), tonnage to be taxed is to be calculated proportionate to man-hours of longshoremen and crew actually handling cargo.’

“Be It Further Resolved that the notification to members of the increase in assessment rates as provided in the By-Laws be accompanied by a letter explaining fully the necessity for increasing the assessment rate at this time.” [85]

PLAINTIFF'S EXHIBIT 6

Admitted March 22, 1945

Waterfront Employers Association
Of the Pacific Coast
Federal Reserve Bank Building
Sansome at Sacramento Street
San Francisco, Cal.

May 20th, 1938

Members:

Effective June 1st, 1938, the Board of Directors of the Waterfront Employers Association of the Pacific Coast adopted tonnage assessment rates as follows:

Off-shore and Intercoastal Cargo:

General cargo 21½c per manifest ton
Lumber 21½c per M board feet
Bulk dry cargo 5/10c per ton
(Bulk fluid exempt)
Transshipped cargo ... ½ rate of foregoing
(Each vessel)

Coastwise Cargo:

½ off-shore rates paid in and out (when handled by crew and longshoremen), tonnage to be assessed is to be calculated proportionate to man-hours of longshoremen and crew actually handling cargo.

Very truly yours,

A. BOYD.

Secretary-Treasurer.

WATERFRONT EMPLOYERS
ASSOCIATION OF THE PA-
CIFIC COAST.

AB:LK

This is to certify that the above is a true and correct copy of letter to members of the Waterfront Employers Association of the Pacific Coast from the Secretary-Treasurer, dated May 20, 1938.

[Seal]

A. BOYD,

Secretary.

12/3/43.

Exhibit 3.

PLAINTIFF'S EXHIBIT 7

Admitted March 22, 1945

February 14, 1940

“Whereas, on July 31, 1937, the Board of Directors of the Waterfront Employers Association of the Pacific Coast adopted a resolution, subsequently confirmed in writing by the membership, setting forth therein, among other things, the rate and basis for levying tonnage assessments to cover certain activities of both the Coast Association and local port association; and

“Whereas, confusion has arisen from time to time as to the basis for reporting tonnage and levying assessments;

“Now, Therefore Be It Resolved, that the rate and basis for reporting tonnage and levying assessments effective February 1, 1940, be and is as follows:

“That one assessment to cover all activities of both the Coast Association and the local port association as determined by the Board of Directors

be levied upon the following basis upon all tonnage loaded or discharged at all U. S. Pacific Coast ports (except Alaska ports);

“Off-shore and Intercoastal Cargo:

General cargo	2½¢ per manifest ton
Lumber	2½¢ per M Bd. feet
Bulk cargo dry . . . . .	.5/10 per ton
(Bulk fluid cargo exempt)	

“Transshipped cargo ½ rate of foregoing
(Each vessel)

“Coastwise Cargo:

One-half off-shore rates paid in and out. (when handled by crew and longshoremen), tonnage to be taxed is to be calculated proportionate to man-hours of longshoremen and crew actually handling cargo.

“When ocean revenue is based on weight, 2,000 pounds equals 1 ton, and when ocean revenue is based on measurement, 40 cubic feet equals 1 ton.”

PLAINTIFF'S EXHIBIT 8

Admitted March 22, 1945

May 8, 1940

“Be It Resolved, That the Chair appoint a Committee consisting of the Port Managers and such Stevedore Members as are available together with the Port Treasurer to meet during today's noon recess and prepare a report for further consideration of the Board, concerning the collection of non-member assessments.”

PLAINTIFF'S EXHIBIT 9

Admitted March 22, 1945

May 8, 1940

“Be It Resolved, That it be the recommendation of this Board of Directors that the final draft of the report on the collection of non-member assessments be left to the discretion of the Committee appointed by the Chair, consisting of the managers, contracting stevedores who are ex-officio members of the Board and the Coast Treasurer to develop the policy, for assessing and collecting non-member tonnage and that final action taken by the Committee and consented to in writing by the majority of the member stevedores in the several ports in connection therewith be approved as the action of this Board.

“(The Committee's Report as finally adopted is attached and made a part of these Minutes.)”

The Committee's Report attached thereto was the following memorandum agreement:

“May 9, 1940

Memorandum Agreement

Pursuant to Resolution of the Board of Directors of the Waterfront Employers Association of the Pacific Coast, passed on May 8, 1940, which rescinds the resolution of February 15, 1940, on this subject:

The Stevedore members of the District Waterfront Employers Associations undertake to collect and remit to the Waterfront Employer Associations

the uniform coast tonnage tax on all cargo handled by them for non-member steamship companies. Each stevedore will include in his contract with non-members——

‘The company (here put in name of party to contract) agrees to observe the labor agreements of the Waterfront Employers Association under which this contract is carried on by the stevedore, to which agreements the stevedore is a party; and further agrees to reimburse the stevedore for the port labor charge assessed against the cargo by the Waterfront Employers Associations where the labor is performed. For your information, the current rates are:

as authorized by the enclosed tariff of the Waterfront [89] Employers Association.

The Coast Association will keep the stevedore members advised through the District Association of——

1. The list of member steamship companies (for whom the stevedore accepts no responsibility for payment of tonnage tax);
2. Current tonnage assessments rates;
3. The method and forms of reporting tonnage and remitting assessments.

The Coast Association will consider relieving member stevedores from payment of tonnage assessments for non-member lines upon written statement of the facts that they have tried but failed to collect under the foregoing contract provisions.

The District Associations undertake to collect from non-member stevedores for their non-member steamship companies the man-hour charge of 4c in lieu of the membership tonnage, and remit to the Coast Association.

The foregoing is effective
(Date)

Initialed by:

Member Stevedores

.....
.....
.....
.....
.....

Waterfront Employers of Wash-
ington,

By.....

Waterfront Employers of Port-
land,

By.....

Waterfront Employers Associa-
tion of Southern California,

By.....

Waterfront Employers Associa-
tion of San Francisco and of the
Pacific Coast,

By.....

Exhibit F

PLAINTIFF'S EXHIBIT 10

Admitted March 22, 1945

Phone Exbrook 3913

Waterfront Employers Association
Of the Pacific CoastFederal Reserve Bank Building
Sansome at Sacramento Street
San Francisco, Cal.

May 9, 1940

Members:

Tonnage Assessments

The Board of Directors, on February 15, 1940, adopted the following clarification for reporting and levying tonnage assessments:

The rate and basis for reporting tonnage and levying assessments effective February 1, 1940, be and is as follows:

Upon all tonnage loaded or discharged at all U. S. Pacific Coast ports (except Alaska ports):

Off-shore and Intercoastal Cargo:

General cargo $21\frac{1}{2}$ c per manifest tonLumber $21\frac{1}{2}$ c per M Bd. ft.Bulk cargo dry $5/10$ per ton

(Bulk fluid cargo exempt)

Transshipped cargo ... $1\frac{1}{2}$ rate of foregoing

(Each vessel)

Coastwise Cargo:

$1\frac{1}{2}$ off-shore rates paid in and out. When handled by crew and longshoremen, tonnage to be taxed is to be calculated proportionate to

man-hours of longshoremen and crew actually handling cargo.

When ocean revenue is based on weight, 2,000 pounds equals 1 ton;

When ocean revenue is based on measurement, 40 cubic ft. equals 1 ton.

A. BOYD,
Secretary.

EXHIBIT 5

This is to certify that I have carefully compared the transcript, to which this certificate is attached with the record on file in this office of which it purports to be a copy, and that the same is a full, true and correct copy thereof.

A. BOYD,
Secretary-Treasurer, Waterfront Employers Association of the Pacific Coast.

Dated at San Francisco this 26th day of Nov. 1943. [91]

PLAINTIFF'S EXHIBIT No. 10

May 9, 1940

Memorandum Agreement

Pursuant to Resolution of the Board of Directors of the Waterfront Employers Association of the Pacific Coast, passed on May 8, 1940, which re-

scinds the resolution of February 15, 1940, on this subject:

The stevedore members of the District Waterfront Employers Associations undertake to collect and remit to the Waterfront Employer Associations the uniform coast tonnage tax on all cargo handled by them for non-member steamship companies. Each stevedore will include in his contract with non-members——

“The company (here put in name of party to contract) agrees to observe the labor agreements of the Waterfront Employers Association under which this contract is carried on by the stevedore, to which agreements the stevedore is a party; and further agrees to reimburse the stevedore for the port labor charge assessed against the cargo by the Waterfront Employers Associations where the labor is performed. For your information, the current rates are:

as authorized by the enclosed tariff of the Waterfront Employers Association.

The Coast Association will keep the stevedore members advised through the District Associations of—— [92]

1. The list of member steamship companies (for whom the stevedore accepts no responsibility for payment of tonnage tax);
2. Current tonnage assessment rates;
3. The method and forms of reporting tonnage and remitting assessments.

The Coast Association will consider relieving member stevedores from payment of tonnage assessments for non-member lines upon written statement of the facts that they have tried but failed to collect under the foregoing contract provisions.

The District Associations undertake to collect from non-member stevedores for their non-member steamship companies the man-hour charge of 4c in lieu of the membership tonnage, and remit to the Coast Association.

The foregoing is effective
(Date)

Initialed by:

Member Stevedores:

Griffiths & Sprague Stevedoring
Co.

J. Weber.

Northern Stevedores, Inc.

F. E. Settersten.

Waterfront Employers of Wash-
ington,

By.....

Waterfront Employers of Port-
land,

By.....

Waterfront Employers Associa-
tion of Southern California,

By.....

Waterfront Employers Associa-
tion of San Francisco and of
the Pacific Coast,

By.....

PLAINTIFF'S EXHIBIT 11

Admitted March 22, 1945

"Be It Resolved That effective May 1st, 1940, each port association levy against non-members an assessment of four (4c) cents per man-hour for all longshoremen ordered and dispatched from the hiring hall to perform their work, and that all man-hour assessments collected be remitted to the Waterfront Employers Association of the Pacific Coast as part of the general funds of said Association."

Exhibit 4

PLAINTIFF'S EXHIBIT 12

Admitted March 22, 1945

August 14, 1940

"The great majority of contract stevedores have voluntarily accepted the program laid down by this Board and agreed to be responsible for the collection of assessments on non-member tonnage handled by them. A few firms have thus far refused to accept this responsibility. In fairness to those who have agreed to take it, your committee recommends that formal action be taken by this Board making acceptance of responsibility for non-member tonnage assessments a condition of membership for all contracting stevedore firms after a period allowing reasonable notice to those firms who have not voluntarily complied with this requirement."

Above recommendation adopted by the Board.
Exhibit G

PLAINTIFF'S EXHIBIT 13

Admitted March 22, 1945

Phone EXbrook 3913

Waterfront Employers Association
Of the Pacific Coast
Federal Reserve Bank Building
Sansome at Sacramento Street
San Francisco, Cal.

August 17, 1940

Members:

CONTRACT STEVEDORES
NON-MEMBER ASSESSMENTS

The Board of Directors at their regular Quarterly Meeting held in San Francisco August 14, 1940, unanimously adopted the recommendation of the Budget and Finance Committee reading as follows:

“The great majority of contract stevedores have voluntarily accepted the program laid down by this Board and agreed to be responsible for the collection of assessments on non-member tonnage handled by them. A few firms have thus far refused to accept this responsibility. In fairness to those who have agreed to take it, your committee recommends that formal action be taken by this Board making acceptance of responsibility for non-member tonnage assessments a condition of membership for all contracting stevedore firms after a period allowing

reasonable notice to those firms who have not voluntarily complied with this requirement.”

A. BOYD,

Secretary-Treasurer.

WATERFRONT EMPLOYERS
ASSOCIATION OF THE PA-
CIFIC COAST.

This is to certify that the above is a true and correct copy of letter of August 17, 1940, from the Secretary-Treasurer of the Waterfront Employers Association of the Pacific Coast to its members.

[Seal]

A. BOYD,

Secretary.

12-3-43

Waterfront Employers As-
sociation of the Pacific
Coast. [97]

Exhibit 6

PLAINTIFF'S EXHIBIT 14

Admitted March 22, 1945

March 12, 1941

“Be It Resolved, That it be the recommendation of this Board that when contracting stevedore members of any port association handle cargo for

the United States Army or the United States Navy, that the contracting stevedores be required to collect the tonnage assessment and pay the Association assessments for such cargo handled in conformity with the agreement, authorized by the Board May 8, 1940, and signed by all of the contracting stevedore members of the several port associations on the Pacific Coast." [97-A]

Exhibit H

PLAINTIFF'S EXHIBIT 15

Admitted March 22, 1945

April 16, 1942

"Be It Resolved, That the Treasurer of this Association be instructed to request all Member Companies and Contracting Stevedores, Members of the several Port Associations, to regularly report at monthly intervals, all tonnage handled by them for the account of the Army and the Navy, and that reporting of such tonnage be immediately submitted of all tonnage in the past which has not been so reported to the Association, and

"Be It Further Resolved, That the Treasurer be authorized to outline to the Member Companies and Contracting Stevedores the manner of reporting Army and Navy tonnage to the Association."

Exhibit I

PLAINTIFF'S EXHIBIT 16

Admitted March 22, 1945

Phone EXbrook 3913

Waterfront Employers Association
Of the Pacific Coast
Federal Reserve Bank Building
Sansome at Sacramento Street
San Francisco, Cal.

April 27, 1942

To Members:

Re: Tonnage Assessments, Army and Navy
Cargoes.

At a Meeting of the Board of Directors of the Coast Association April 16, 1942, the Treasurer of the Association was authorized to request all Member Companies and Contracting Stevedores, Members of the several Port Associations, or Associate Members of the Coast Association, to regularly report at monthly intervals all tonnage handled by them for account of the Army and Navy, also that all Army and Navy tonnage handled in the past, be immediately reported to the Association, either at San Francisco, or to one of the other Port Associations in accordance with past practice in reporting tonnage.

The Treasurer was further authorized to outline to the Member Companies and Contracting Stevedores, the manner of reporting Army and Navy tonnage to the Association.

In the past Shipping Members of the Association have reported all of their own cargo, and such non-member cargo handled where they acted as Agents, regardless of whether the stevedoring was done by themselves, or by a Contracting Stevedore, and all Contracting Stevedores handling cargo for non-Member Lines were obligated, by Resolution of the Board, and by a jointly signed Agreement by the Contracting Stevedores to report to the Association all such non-Member tonnage, and also to protect the Associations' tonnage and assessments.

It is our understanding, under the present or proposed Army and Navy Contracts under which Army and Navy cargoes are handled, that provision is made therein for paying a portion of the Association's tonnage assessments to the Contracting Stevedore handling such cargo, but no provision is made for paying any portion of the tonnage assessment to the Steamship Company who acts as Terminal Operator in connection with the same cargo under Terminal Contract with the Army and Navy.

In light of the above, it is requested that all Contracting Stevedores, Members of the several Port Associations, and Steamship Operators who handle their own stevedoring operations, report monthly on the regular tonnage assessment forms, which have been in use for some years, all cargoes handled by them for the Army and the Navy, making such reportings on a separate report from any commercial cargoes, if any, which they handle. [99]

By making reportings in this manner it will en-

able the Association to keep track of the tonnage handled, and render tonnage assessments at the rates now in effect and established by the Coast Board, altho the rate set forth in the Army Contract does not coincide with the Association's tonnage assessment rate.

At the April 16th Meeting of the Board, a Committee was authorized to make a study and recommend to the Board the rate for tonnage assessments to be levied in connection with Army and Navy tonnage handled by Steamship Companies, or Contracting Stevedores, Members or Associate Members of this Association. However, until such time as the Board changes the Assessment rate, the base rate of $2\frac{1}{2}$ c per ton still prevails, and none other can be recognized until a change in the rate is made by the Board in conformity with the By-Laws of the Association.

Full circularization is being made to all Members and Associate Members in all ports, in order that there may be no misunderstanding, and all concerned are respectfully requested to promptly comply with the request outlined in this letter.

Yours very truly,

A. BOYD,

Secretary-Treasurer, Waterfront Employers Association of the Pacific Coast.

AB-ih

This is to certify that the foregoing is a true and correct copy of letter of April 27, 1942, from the Secretary-Treasurer of the Waterfront Employers Association of the Pacific Coast to its members.

[Seal]

A. BOYD,

Secretary.

12-3-43

Waterfront Employers Association of the Pacific
Coast.

Exhibit 7

PLAINTIFF'S EXHIBIT 17

Admitted March 22, 1945

June 25, 1942

“Be It Resolved, That the Treasurer be authorized to advise the contracting stevedores and steamship companies doing stevedoring both of which are members of either Coast Association or one of the Port Associations, that the contracting stevedores or the steamship companies doing stevedoring of cargo for either the Army, Navy or WSA is obligated to report the tonnage so handled and pay the assessment to the Association in the same manner that non-member tonnage has been reported to the Association; and

“Be It Further Resolved, That the Board reaffirm the base rate of assessment as $2\frac{1}{2}c$ per ton now in force on commercial cargo.”

Exhibit D

PLAINTIFF'S EXHIBIT 18.

Admitted Mar. 22, 1945.

Phone Exbrook 3913

Waterfront Employers Association
of the Pacific Coast
San Francisco, Cal.

Financial Center Building
405 Montgomery Street

July 1, 1942

To Members:

Re: Tonnage Assessments Army, Navy and
War Shipping Administration.

On April 27th last, members were fully advised as to the procedure to be followed in reporting tonnage and collecting assessments dealing with Army and Navy cargoes and since that time contracts have been consummated with the War Shipping Administration, and the Board by resolution at its meeting of June 25th, authorized the Treasurer to advise all members as to method of reporting tonnage on any such cargoes and the payment of the assessment to the Association. The substance of the authorization was as follows:

That the contracting stevedores and steamship companies doing stevedoring, both of which are members of either the Coast Association or one of the Port Associations which handle cargoes for either the Army, Navy or the War Shipping Administration, is obligated to report the tonnage so handled and pay the assessment to the Waterfront Employers Association of the Pacific Coast or either

of the Port Associations in the same manner that non-member tonnage has been reported to the Association in the past.

The Board again reaffirmed its position that the base rate of assessment on all tonnage handled for either the Army, the Navy or the War Shipping Administration is $21\frac{1}{2}$ c per ton, the rate which is now in force on commercial cargoes.

Full circularization is being made of this material to all members and associate members in all Ports in order that there may be no misunderstanding, and all concerned are urgently requested to promptly comply with the procedure outlined in this letter and should any points not be clear to communicate with this office.

Very truly yours,

A. BOYD

Secretary-Treasurer.

Waterfront Employers Association of the Pacific Coast.

AB:IM

This is to certify that the attached is a true and correct copy of letter from the Secretary-Treasurer of the Waterfront Employers Association of the Pacific Coast to its members, dated July 1, 1942.

[Seal]

A. BOYD

Secretary

12-3-43

Waterfront Employers Association of the Pacific Coast.

Exhibit 8

PLAINTIFF'S EXHIBIT 19.

Admitted Mar. 22, 1945.

Letter of K. J. Middleton on behalf of plaintiff to the defendant, as follows:

“Griffiths & Sprague Steve. Co.,
Seattle, Wash.

October 27, 1942

Gentlemen:

The vexed question of tonnage assessments arising from some stevedore companies failing to remit the tonnage assessments on work done by them will be thoroughly discussed at a meeting to be held in San Francisco on November 11.

Stevedore associations of the Columbia River and Washington districts are invited to send representatives to that meeting.

The position of the Coast Association is that stevedores, by signed agreement, are obligated to pay assessments for non-member companies, and by resolutions of the Coast Board stevedores are held responsible for tonnage assessments on cargo handled by them for the Army and Navy.

In the San Francisco and San Pedro districts that position is accepted, and all stevedore companies are paying these assessments.

The position as developed is:

1—Much Army and Navy Work is concentrated

in Seattle; stevedores have not paid assessments, and in some cases, refuse to report tonnage.

2—The Coast Association has been supported by these tonnage assessments, and without them, cannot meet expenses.

3—We are confronted with the choice of finding income or have the Coast Association cease to exist.

4—If the Coast Association dies, its functions would have to be undertaken by individual or district groups. This is the opposite of the general trend. Other industries are finding it necessary to combine for the same reasons that impelled the Waterfront Employers to do so.

5—Machinery for collective bargaining affecting wages, working hours and rules, safety, labor relations committees, and representation on the Maritime Industry Board would remain a necessity; funds to support the Accident Prevention Bureau and help to maintain hiring halls (as required under the 1934 award) would have to be found. All of which would have to be done by individuals, or new machinery set up to replace the Coast Association and means of meeting expenses found.

It may be unnecessary to remind you of these details, but it seems advisable to emphasize the importance of the coming meeting and the gravity of the situation which confronts us. [103]

“It points the necessity for being fully prepared; and for bringing supporting facts and reasons to

any proposals which may be advanced by the stevedore associations.

If a continued refusal to support the Coast Association, what suggestions, if any, for a substitute, or for such activities as all concerned wish continued?

All of which again hangs on the question of payment of dues to support the expense. Essential to a critical examination of the possibilities is an accurate report of tonnage handled, as a guide for assessments.

In order to get the facts clearly in the open, I am instructed to ask you the specific questions:

(a)—Have you reported all the tonnage handled by you; If not, will you do so up to October 1, 1942, in advance of the meeting of November 11?

(b)—Have you paid tonnage assessments on cargo handled by you to October 1, 1942; if not, will you do so prior to the meeting of November 11?

An early reply will be appreciated and greatly help toward the conclusions we hope to reach at the coming meeting.

Yours very truly,

K. J. MIDDLETON."

Exhibit N

PLAINTIFF'S EXHIBIT 20.

Admitted Mar. 22, 1945.

Letter from the defendant to K. J. Middleton as follows:

“Griffiths & Sprague Stevedoring Company
Colman Building
Seattle, Washington

November 2, 1942.

Mr. K. J. Middleton
Waterfront Employers of Washington
Alaska Building
Seattle, Washington

Dear Sir:

We have for acknowledgment your letter of October 27th. We believe there should be a continuance of the Association and are prepared in a measure to support it. However, no doubt, this will be arrived at the meeting of November 11th in San Francisco.

As to the answers to the questions under Captions A and B in the latter part of your letter we have to advise that we have reported the tonnage on Army ships handled prior to October 1st, 1942, up to and including March, 1942 and we have paid the tonnage dues on Army cargo including October, 1941.

However, since that time this charge has been held in abeyance. The tonnage figures, in connection with Army cargo, has not been reported because of instructions to us that such information is confidential.

We await with interest the out-come of the November 11th meeting.

Yours very truly,

GRIFFITHS & SPRAGUE

STEVEDORING COMPANY

/s/ F. E. SETTERSTEN"

Exhibit O

PLAINTIFF'S EXHIBIT 21

Admitted Mar. 22, 1945.

November 11, 1942.

"Be It Resolved, That it be the order of this Board that all delinquencies covering tonnage assessments for Army and Navy cargo handled in the Puget Sound and Columbia River districts be paid up to date, and

"Be It Further Resolved, That the President appoint a committee to consider whether there should be a division in the Association's tonnage assessment of 2½c on Army and Navy cargo handled in Seattle and Navy cargo handled on the Columbia River between the Stevedore doing the work from the hold to ship's side or vice versa and the Stevedore doing the work between first or last place of rest and ship's side, and that if the said committee determines that there should be a split in the assessments between these two operations that it determine the split and make its recommendations back to this Board forthwith."

Amendment to the above Resolution adopted as follows:

“Be It Resolved, That the committee appointed in the main resolution be requested to explore and decide whether there should be a division of the Association’s tonnage assessments on all cargoes handled by stevedores, in addition to Army and Navy cargo in the Northwest as between hold and ship’s side and first or last place of rest and ship’s side and if the committee determines it should be a split that it report back to the Board its recommendations.”

Exhibit K

PLAINTIFF’S EXHIBIT 22.

Admitted Mar. 22, 1945.

November 12, 1942

“Be It Resolved, That the report of the special committee appointed by the Board of Directors to bring in a report and recommendation on tonnage assessments dated November 12th be accepted by this Board.”

The report of the Special Committee referred to is as follows:

“Minutes of Meeting of Special Committee Appointed by Board of Trustees to Bring in Report and Recommendation on Tonnage Assessments

1:00 p.m. November 12, 1942.

1. Payment of Tonnage Assessments to date.

Poll of members present as to whether or not they would pay resulted:

Matson—Yes	W. J. Jones
Pope-Talbot—Yes	by Roland Clapp—Yes
Spear—Yes	Griffiths & Sprague—No.
Luckenbach—Yes	
Associated—Yes	Portland—Are paying
Rothschilds—Yes	through Moore-McCor-
Olympic—Yes	mick

2. Motion carried on Army and Navy work.

Tonnage assessment of 2½¢ on work exclusively for Army and Navy to be paid by stevedores.

3. Motion carried on War Shipping Administration work.

Tonnage assessments of 2½¢ to be paid by stevedores.

4. Discussion whether an additional charge against handling cargo from first place of rest to ship's sling or vice versa should be paid by members not now contributing. Chairman requested to put the idea before the Board.

Recommendation to the Board of Trustees that Northern Districts members be requested to forward to the Coast Board their recommendation as to above together with any other recommendation on dividing tonnage charges between dock operators and stevedores where possible.

/s/ K. J. MIDDLETON,

Chairman."

Exhibit L

PLAINTIFF'S EXHIBIT 23.

Admitted Mar. 22, 1945.

February 25, 1943.

1. The National Longshoremen's Board in 1934 awarded a contract to the Longshoremen's Union on a Coastwide basis.

The Waterfront Employers Association of the Pacific Coast was formed in 1937 to provide the means for collective bargaining and working under the Coastwide contract.

The Maritime Industry Board created in 1942 was given Coastwide jurisdiction.

Industry-wide Associations, more and more are coming into existence for collective bargaining and administering labor contracts.

Therefore:

Resolved that the Waterfront Employers Association of the Pacific Coast must be maintained intact and any tendency toward secession of any district resisted, in order to preserve the benefits of the thought and work expended in the formation and development of the Coast Association and to conserve the benefits which will inure on the return to commercial practice.

2. Whereas Messrs. Griffiths and Sprague, stevedores of Seattle, members of the Waterfront Employers of Washington refuse to conform to the resolutions of the Coast Board quoted below:

April 16, 1942——

“Be It Resolved, That the Treasurer of this Association be instructed to request all Member Companies and Contracting Stevedores, Members of the several port Associations, to regularly report at monthly intervals, all tonnage handled by them for the account of the Army and the Navy, and that reporting of such tonnage be immediately submitted of all tonnage in the past which has not been so reported to the Association, and

“Be It Further Resolved, That the Treasurer be authorized to outline to the Member Companies and Contracting Stevedores the manner of reporting Army and Navy tonnage to the Association.”

June 25, 1942:

“Be It Resolved, That the Treasurer be authorized to advise the contracting stevedores and steamship companies doing stevedoring both of which are members of either Coast Association or one of the Port Associations, that the contracting stevedores or the steamship companies doing stevedoring of cargo for either the Army, Navy or WSA is obligated to report the [108] tonnage so handled and pay the assessment to the Association in the same manner that non-member tonnage has been reported to the Association; and

“Be It Further Resolved, That the Board reaffirm the base rate of assessment as $2\frac{1}{2}c$ per ton now in force on commercial cargo.”

and have refused to pay any tonnage assessments

since September 30, 1941, or to report tonnage handled by them since March 31, 1942.

Therefore:

Resolved, That the matter be placed in the hands of the Coast Association's attorneys in Seattle to have papers prepared for entering suit against Messrs. Griffiths and Sprague to recover the amount owing by them.

Also, that Messrs. K. Colman and D. K. MacDonald, stockholders, and the officers of Messrs. Griffiths and Sprague Company be accorded the courtesy of advance notice of impending action.

3. Resolved, That a Committee of three principals, members of the Association go to Seattle to:

(a) Meet with the Board of Trustees of the Washington District to present the position of the Coast Board and enlist the support of the Washington Board in an effort to resolve this situation.

(b) If time and circumstance permit, to call on Messrs. Griffiths and Sprague to effect a method of payment with authority hereby given to the Committee to agree to any reasonable basis of deferred payments.

Resolved, That San Francisco Employers having agents in Seattle advise them fully of these proceedings with instructions to such who are members of the Washington Board of Trustees to attend any meeting called to consider this matter and vote to support the action of the Coast Board."

Exhibit 9

PLAINTIFF'S EXHIBIT 24.

Admitted Mar. 22, 1945.

Minutes of Meeting of Board of Trustees
Waterfront Employers of Washington

3:00 p.m.—March 10, 1943.

Present:

E. C. Bentzen	C. B. Warren
H. W. Burchard	F. E. Settersten
R. C. Clapp	W. J. Bush
H. E. Rhoda	T. James
L. J. Rogers	J. A. Lunny
Wm. Semar	W. T. Sexton
Sam Stocking	Lawrence Bogle
R. A. Tinling	K. J. Middleton
W. D. Vanderbilt	M. G. Ringenberg

Purposes—Discussion of delinquency of Messrs. Griffiths and Sprague and other members of the Association in the matter of tonnage assessments due to the Waterfront Employers Association of the Pacific Coast for work done by them for the U. S. Army and Navy.

Mr. Middleton presided and outlined his recent visit to San Francisco which resulted in a committee of four principals, now present, coming from San Francisco with the purpose of trying effect a settlement of these delinquencies without having recourse to law.

Members of the San Francisco committee next spoke reciting negotiations and meetings held in other ports, explained the situation in San Fran-

cisco; the particular arrangement with the U. S. Army there which does not involve contracting stevedores, the Navy contracts, and the general result that the tonnage tax is being paid in all ports other than Washington District.

The committee hoped to convince the delinquents of their responsibility, said that no retroactive compromise could be accepted, [110] and if not successful lawsuits would be commenced.

The discussion throughout was friendly.

The meeting recessed to allow the San Francisco Committee to meet with Messrs. Griffiths and Sprague.

4:00 p.m. meeting resumed with Messrs. Settersten and Hay present.

Mr. Hay stated that after discussion with the committee his client felt they had a moral obligation to pay. After some discussion Mr. Hay submitted the following written statement:

“Mr. Hay stated on behalf of his client, Griffiths and Sprague Stevedoring Company, that his principals had met with the committee from San Francisco and had ironed out with them certain matters which had been misunderstood or in dispute, and that his client felt that, having accepted benefits of the Coast Association there was a moral obligation to pay for such benefits, that the matter of legal liability was waived, and that his client would pay back assessments of 21½¢ a ton, and future assessments made by the Coast Association, method of

payment to be arrived at with the San Francisco committee following adjournment of this meeting."

The memorandum referred to in the above statement was drafted subsequently in the form of a letter and signed by Mr. Hay as secretary of Griffiths and Sprague Stevedoring Co., it reads:

"To the Committee from

Waterfront Employers Ass'n. of the Pacific Coast
Alaska Building
Seattle, Washington.

"Gentlemen:

"This is to advise you that on the tonnage handled by us for the U. S. Army up until January 31, 1943, upon which no tonnage assessment has been paid, we will pay the Waterfront Employers Association of the Pacific Coast the tonnage assessment of 21½c per ton on a volume of tonnage to be determined; payment to be made in approximately equal installments of thirty, sixty and ninety days from this date. [111]

"Also from February 1, 1943 onward, we will pay the tonnage assessments currently at the rate set by the Coast Association.

Very truly yours,

GRIFFITHS & SPRAGUE

STEVEDORING COMPANY

By M. E. HAY,

Secretary"

Mr. Settersten moved, Mr. Clapp seconded:

"That the matter of the local assessment of 1%

be levied by the Finance Committee with a view to reductions if possible." Carried.

Mr. Clapp moved, Mr. Semar seconded:

"Moved that a committee to be named by the Waterfront Employers of Washington will present proposal to the San Francisco committee, present at this meeting, outlining the position that there are interests within the industry who are enjoying all the benefits of the Coast Association without making any monetary contribution to cover. The individual members of the California committee have agreed that they would sympathetically and energetically present the picture to the Coast Association with a view to correcting the situation." Carried.

Committee appointed:

R. C. Clapp, Chairman, F. E. Settersten, Sam Stocking, Wm. Semar.

Mr. Vanderbilt remarked that we have allowed delinquencies to run too long and suggested a limit of 60 days' delay, thereafter delinquents to be dealt with legally.

The chairman and each of the members of the San Francisco Committee expressed gratification for the settlement of this vexed question, the committee feeling it was a happy outcome of their visit.

Mention was made of other delinquents, viz Western Stevedore Co., [112] and stevedores at Everett, Bellingham and Grays Harbor, with comment that these too must be settled or action taken.

Meeting adjourned at 4:50 p.m.

Secretary.

President. [113]

PLAINTIFF'S EXHIBIT 25.

Admitted Mar. 22, 1945.

March 11, 1943.

To the Committee from
Waterfront Employers Ass'n. of the Pacific Coast
Alaska Building
Seattle, Washintgon.

Gentlemen:

This is to advise you that on the tonnage handled by us for the U.S. Army up until January 31, 1943, upon which no tonnage assessment has been paid, we will pay the Waterfront Employers Association of the Pacific Coast the tonnage assessment of $2\frac{1}{2}c$ per ton on a volume of tonnage to be determined; payment to be made in approximately equal installments of thirty, sixty and ninety days from this date.

Also from February 1, 1943 onward, we will pay

the tonnage assessments currently at the rate set by the Coast Association.

Very truly yours,

GRIFFITHS & SPRAGUE
STEVEDORING COMPANY

By M. E. HAY,
Secretary. [114]

PLAINTIFF'S EXHIBIT 30

Admitted Mar. 22, 1945.

Tonnage Reported to Waterfront Employers of Washington
on War Shipping Administration Ships

						Payments
Year 1942	31848 Tons	at 2½c	\$ 796.21	9/16/42		29.58
(March-December)				3/4/43		409.88
				"		249.95
				12/13/43		106.80
						<hr/> 796.21
Year 1943	62464 Tons	at 2½c	1561.61	3/5/43		403.43
				3/17/43		97.75
				12/13/43		174.53
				12/13/43		77.05
				12/13/43		236.85
				"		200.42
				"		112.00
				12/24/43		95.85
				1/22/44		39.03
				1/25/44		124.70
						<hr/> 1561.61
Year 1944	6111 Tons	at 2½c	152.78	1/15/44		70.55
(Thru August)				3/16/44		46.73
				6/27/44		35.50
						<hr/> 152.78

Exhibit "B"

PLAINTIFF'S EXHIBIT 31

Admitted Mar. 22, 1945.

Tonnage Reported on United States Army Cargo From
March 1, 1942 to December 31, 1942, inclusive

Date of Payment	Amount Paid at 21½¢ Per Ton
March 22, 1943	\$ 755.50
May 18, 1943	773.45
" " "	1,152.48
" " "	1,495.03
" " "	2,066.23
" " "	2,475.28
" " "	2,513.65
Nov. 23, 1943	2,786.00
" " "	1,562.10
" " "	2,290.73
Exhibit "C"	

PLAINTIFF'S EXHIBIT 32.

Admitted Mar. 23, 1945.

Minutes of Joint Meeting of Committee of Seattle
and San Francisco Representatives Regarding
Assessments.

May 26, 1943—10:00 a.m.

Room 308—Financial Center Building
405 Montgomery Street,
San Francisco, California

Present:

San Francisco Representatives:

Messrs. T. C. Greene, Tom James, W. J. Bush,
E. N. W. Hunter, W. T. Sexton.

Seattle Representatives:

Messrs. Sam Stocking, Roland Clapp, Bud
Weber, Lawrence Bogle.

Portland Representatives:

Messrs. A. J. Chalmers, C. W. Spear.

Outport Representatives:

Messrs. Frank Hill (Washington), Frank Shaw (Oregon).

Also Present:

F. P. Foisie, K. J. Middleton, Gregory A. Harrison, A. Boyd, A. E. Mills, M. G. Ringenberg, E. S. Coates, E. J. Baird. [117]

Mr. Foisie announced that this meeting had been called to discuss with the Seattle representatives the exchange of proposals between the Seattle and San Francisco Committees regarding collection of Tonnage Assessments and that representatives from Portland were invited to sit in.

Mr. Bogle, acting as spokesman for the Seattle Committee, stated a new proposal had been made, which last night had been endorsed by the Portland Committee.

The proposal would put all assessments on a man-hour basis and instead of placing responsibility on the Contracting Stevedore for payment of Tonnage Assessments to the Coast Association that the local Port Association would collect a man-hour charge from all employers using men out of the Hiring Hall; that out of this fund the Tonnage Assessment would be paid to the Coast Association by the Port Association.

Mr. Stocking, speaking for Terminal Operators in the Northwest, pointed out that terminal operators and the Port Authorities were paying nothing

in support of the Coast Association although using men out of the Hiring Halls. He stated that the Terminal Operators and the Port Authorities were agreeable to paying something if a policy was adopted where all pay who use men out of the Hall. He urged that such a policy should have direct Coast Association backing to become effective.

Mr. Frank Hill—Approved payment of 2½¢ a ton, the Coast Association Assessment, but stated that the Port Authorities in Grays Harbor and Olympia would not be willing to pay a man-hour charge such as proposed. [118]

After further discussion, upon a motion duly made and seconded, the following was adopted:

It is agreed that the Seattle and Portland representatives, together with Mr. Bogle and Mr. Harrison, meet at 2:00 p.m. today to draft the assessment proposal discussed at this meeting and submit to this Committee at 2:30 p.m. today for discussion before final submission to the Coast Board tomorrow, May 27, 1943.

The Meeting adjourned at 12 noon and reconvened at 2:30 p.m., at which time the Special Committee's Report was read (Copy attached and made part of these Minutes).

Upon motion of Mr. Stocking, seconded by Mr. James, it was agreed to submit the Committee's report to the Coast Board tomorrow.

Meeting adjourned at 3:45 p.m.

/s/ A. BOYD,
Secretary.

This is to certify that I have careful compared the transcript, to which this certificate is attached, with the record on file in this office of which it purports to be a copy, and that the same is a full, true and correct copy thereof.

A. BOYD,

Secretary-Treasurer

Waterfront Employers Association of the Pacific Coast.

Dated at San Francisco this 10 day of August, 1944. [119]

May 26, 1943.

A joint committee of the Waterfront Employers Association of the Pacific Coast, Waterfront Employers of Washington and Waterfront Employers of Portland having met to consider measures to satisfy parties in interest in respect to future payment of tonnage assessments owing by the member companies to the Coast Association recommend the following:

1. All members of the Coast Association who are employers of longshore labor will continue to be directly responsible for the tonnage assessment as set by the Coast Association;

2. The Washington and Portland Associations will take the appropriate action including any necessary changes in the Articles and By-Laws and any necessary resolutions to impose an assessment upon their respective members at a specified rate per man-hour for all labor subject to the jurisdiction of the local Association;

3. The Washington and Portland Associations propose to use funds collected in the manner aforesaid for the purpose of paying on behalf of their respective members the tonnage assessments owing by them to the Coast Association;

4. In the event that member companies of the Washington or Portland Associations shall fail or decline to pay their local man-hour and also fail to pay tonnage assessments to the Coast Association they will be in default to both the local and Coast Associations which will act in concert for [120] the purpose of compelling them to abide by their obligations either by appropriate legal proceedings or such action in respect to their member companies as shall seem desirable.

The Coast Association is expected to lend its full cooperation and aid to the end that all users of longshore labor in the Washington and Oregon areas shall contribute on a man-hour basis to the local Associations for all such labor used.

This is to certify that I have carefully compared the transcript, to which this certificate is attached, with the record on file in this office of which it purports to be a copy, and that the same is a full, true and correct copy thereof.

A. BOYD,

Secretary-Treasurer

Waterfront Employers Association of the Pacific Coast.

Dated at San Francisco this 10 day of August 1944. [121]

PLAINTIFF'S EXHIBIT 33.

Admitted Mar. 23, 1945.

Excerpt from Minutes of Meeting of the Board of
Directors of the Waterfront Employers Asso-
ciation of the Pacific Coast.

May 27, 1943—2:10 p.m.

Room 308—Financial Center Building
405 Montgomery Street
San Francisco, California

Present:

Messrs. Ralph Myers, H. C. Ewing, F. L. Doelker,
A. E. Stow, Lawrence Bogle, E. N. W. Hunter,
Geo. Schirmer, Chas. W. Spear, A. J. Chalmers,
Sam Stocking, A. E. Mills, Tom James, Nick Miller,
R. C. Clapp, W. J. Bush, M. J. Weber, W. D.
Clark, Fred Hooper, Joe Banning, C. T. Tilley,
Frank Shaw, Frank Hill.

Also Present:

Messrs. F. P. Foisie, K. J. Middleton, Gregory
A. Harrison, F. C. Gregory, J. B. Bryan, M. G.
Ringenberg, E. S. Coates, E. J. Baird.

Purpose of Meeting

Election of Officers.

Proposed changes in Assessments in Washington
and Oregon.

Reports from Ports.

Northwest Assessments.

The report of the Joint Committee regarding col-
lection of assessments was read, copy of which is

attached and made a part of these Minutes. (See Minutes of Committee of May 26th and copy.) [122]

Upon motion of Mr. James, seconded by Mr. Doelker, the following Resolution was unanimously adopted:

Be It Resolved, That the Committee's report on collection of man-hour charges to satisfy Coast tonnage assessments in the Washington and Oregon areas be adopted.

Outport Conditions.

Both Mr. Shaw for Oregon Outports and Mr. Hill for Washington Outports, presented their positions and asked for relief from paying assessments—both Mr. Shaw's and Mr. Hill's statements are attached and made a part of these Minutes.

No official action was taken regarding these petitions.

Meeting adjourned at 3:05 p.m.

/s/ A. BOYD,
Secretary.

This is to certify that I have carefully compared the transcript, to which this certificate is attached, with the record on file in this office of which it purports to be a copy, and that the same is a full, true and correct copy thereof.

A. BOYD,

Secretary-Treasurer

Waterfront Employers Association of the Pacific Coast.

Dated at San Francisco this 10 day of August 1944. [123]

PLAINTIFF'S EXHIBIT 34.

Admitted Mar. 22, 1945.

Agreement Between

DISTRICT No. 1 OF THE INTERNATIONAL
LONGSHOREMEN'S AND WAREHOUSE-
MEN'S UNION

and

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST

On Behalf of:

WATERFRONT EMPLOYERS OF WASHING-
TON, WATERFRONT EMPLOYERS OF
PORTLAND, WATERFRONT EMPLOY-
ERS ASSOCIATION OF SAN FRAN-
CISCO, WATERFRONT EMPLOYERS
ASSOCIATION OF SOUTHERN CALI-
FORNIA.

Effective December 20, 1940. [124]

AGREEMENT

This Agreement by and between the International Longshoremen's and Warehousemen's Union, District No. 1, hereinafter designated as the Union, and the Waterfront Employers Association of the Pacific Coast on behalf of the Waterfront Employers of Washington, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco and Waterfront Employers Associa-

Plaintiff's Exhibit 34—(Continued)
tion of Southern California, hereinafter designated
as the Employers:

WITNESSETH

The award of the National Longshoremen's Board dated October 12, 1934, as amended by agreements of February 4, 1937, July 15, 1938 and October 1, 1938, as interpreted by arbitrators in awards rendered thereunder, is hereby extended and renewed in form so amended as to read in the manner hereafter set forth. Said amended agreement shall become effective on the date hereof, and remain in effect until September 30, 1942, and shall be deemed renewed thereafter from year to year unless either party gives written notice to the other of a desire to modify or terminate the same, said notice to be given at least sixty (60) days prior to the expiration date. Negotiations shall commence within ten (10) days after the giving of such notice. [125]

Section 1.

The provisions of this agreement shall apply to all handling of cargo in its transfer from vessel to first place of rest, and vice versa, including sorting and piling of cargo on the dock, and the direct transfer of cargo from vessel to railroad car or barge, and vice versa, when such work is performed by employees of the companies parties to this agreement.

It is agreed and understood that if the employers,

Plaintiff's Exhibit 34—(Continued)

parties to this agreement shall sub-contract work as defined herein, provisions shall be made for the observance of this agreement.

The following occupations shall be included under the scope of this agreement: Longshoremen, gang bosses, hatch tenders, winch drivers, donkey drivers, boom men, burton men, sack turners, side runners, front men, jitney drivers, lift jitney drivers, and any other person doing longshore work as defined in this section.

Section 2.

Six hours shall constitute a day's work. Thirty hours shall constitute a week's work, averaged over a period of four weeks. The first six hours worked between the hours of 8 a.m. and 5 p.m. shall be designated as straight time, but there shall be no relief of gangs before 5 p.m. All work in excess of six hours between the hours of 8 a.m. and 5 p.m. and all work during meal time and between 5 p.m. and 8 a.m. on [126] weeks days and from 5 p.m. on Saturday to 8 a.m. on Monday, and all work on legal holidays, shall be designated as overtime. Meal time shall be any one hour between 11 a.m. and 1 p.m. When men are required to work more than five consecutive hours without an opportunity to eat, they shall be paid time and one-half of the straight or overtime rate, as the case may be, for all time worked in excess of five hours without a meal hour.

Plaintiff's Exhibit 34—(Continued)

Section 3.

(a) The basic rate of pay for longshore work shall not be less than Ninety-five cents (95c) per hour for straight time, nor less than one dollar and forty cents (\$1.40) per hour for overtime, provided, however, that for work which is now paid higher than the present basic rates, the differentials above the present basic rates shall be added to the basic rates established in this paragraph. Wage rates specified in this paragraph shall be subject to review at the time and in the manner hereinafter set forth.

(b) In addition to the basic wages for longshore work as provided in Section 3 (a), additional wages to be called penalties shall be paid for the types of cargo, condition of cargoes, or working conditions specified below.

The penalty rates hereinafter set forth shall be the only penalty cargo rates payable and none of such penalty cargo rates shall hereafter be subject to alteration or amendment except by agreement of all of the parties hereto.

Penalty cargo rates shall apply to all members of the longshore gang, including dockmen, except where herein otherwise [127] specified. Where differentials are now paid for skill, penalty cargo rates shall not be pyramided thereon. Where the cargo penalty rate herein is higher than the skilled rate paid to any member of the gang, such member

Plaintiff's Exhibit 34—(Continued)

shall receive the cargo penalty rate less the allowance which he is receiving for skill.

Present port practices shall be continued in the payment of penalties to gang bosses, if they are employed.

Where two penalties might apply the higher penalty shall apply and in no case shall more than one penalty be paid.

Penalty Cargo Rates

Commodities and Conditions of Work	Penalty Rate
For shovelling all commodities except on commodities earning higher rate,	
Straight time, per hour	20c
Overtime, per hour	30c
To Boardmen stowing bulk grain:	
Straight time, per hour	30c
Overtime, per hour	30c
For handling bulk sulphur, soda ash and crude untreated potash:	
Straight time, per hour	45c
Overtime, per hour	45c
Untreated or offensive bones in bulk:	
Straight time, per hour	75c
Overtime, per hour	30c
For handling phosphate rock in bulk:	
Straight time, per hour	30c
Overtime, per hour	30c

Plaintiff's Exhibit 34—(Continued)

Penalty
Rate

When handling the following commodities in lots of 25 tons or more a penalty for both straight and overtime work in addition to the basic rate shall be 10c per hour:

Straight time, per hour	10c
Overtime, per hour	10c

Alfalfa Meal. Untreated or offensive bones in sacks. Caustic soda in drums. Celite and decolite in sacks. Coal in sacks.

Cement:

- (a) All discharging from ships.
- (b) Loading only when in bags with no inner containers, unless the cargo falls within the provision relating to damaged cargo.

Creosote, when not crated. Creosote Wood Products unless boxed or crated.

Following fertilizers in bags:

Tankage, animal, fish, fishmeal, guano, blood meal and bone meal.

Glass, broken, in sacks. Green Hides. Herring, in boxes and barrels; Lime, in barrels and loose mesh sacks.

Plaintiff's Exhibit 34—(Continued)

Penalty
Rate

Lumber products loaded out of water, including that part of cribs only which has been submerged.

Meat Scraps, in sacks. Nitrates, crude untreated, in sacks. Ore, in sacks. Phosphates, crude, untreated, in sacks. Plaster, in sacks without inner containers.

Refrigerated Cargo: Handling and stowing refrigerator space meats, fowl and other similar cargoes to be transported at temperatures of freezing or below in the boxes. [129]

Sacks: Loading only and to apply to the entire loading operation where table or chutes are used and the men are handling sacks weighting 120# or over on the basis of one man per sack.

Salt Blocks in sacks.

Scrap metal in bulk and bales, excluding rails, plates, drums, car wheels and axles.

Soda Ash in bags.

When the following cargoes are leaking or sifting because of damage or

Plaintiff's Exhibit 34—(Continued)

Penalty
Rate

faulty containers, a penalty of 10c per hour shall be paid:

Straight time, per hour	10c
Overtime, per hour	10c

Analine Dyes.

Fish Oil, whale oil and oriental oils, in drums, barrels or cases.

Lamp Black.

Penalties to Certain Gang Members:

To winch drivers, hatch tenders, side runners, burton men, donkey drivers, stowing machine drivers and boom men only:

Handling lumber and logs out of water:

Straight time, per hour	20c
Overtime, per hour	20c

To Boom Men only:

Handling creosoted products out of water

Straight time, per hour	30c
Overtime, per hour	30c

To Hold Men only:

All paper and pulp in packages weighing 300 lbs. or over per package, only when winging up, and when stowing in

Plaintiff's Exhibit 34—(Continued)

Penalty
Rate

fore peaks, after peaks and special compartments other than regular cargo spaces. (This does not apply to rolls)

Straight time, per hour 10c

Overtime, per hour 10c

To Hold Men only:

Head Room: When there is less than 6 ft. of head room——

(a) Loading cargo in hold on top of bulk grain.

(b) Covering logs or piling with lumber products.

Straight time, per hour 10c

Overtime, per hour 10c

Penalties for Special Conditions of
Work:

Damaged Cargo: Cargo badly damaged by fire, collision, springing a leak or stranding, for that part of cargo only which is in a badly damaged or offensive condition:

Straight time, per hour 55c

Overtime, per hour 10c

Cargo damaged from causes other than those enumerated above, shall, if inspection warrants, pay the damaged cargo rate or such other rate as determined by the Port Labor Relations Committee for

Plaintiff's Exhibit 34—(Continued)

Penalty
Rate

handling that part of the cargo only which is in a badly damaged or offensive condition. This provision shall apply only to individual consignments which are damaged and shall not empower any committee to add to or detract from the penalty cargo rates herein specified.

Explosives: When working explosives, as defined by current Western Classification Rules, all men working ship and barge to receive:

Straight time, per hour	45c
Overtime, per hour	

Fire: When fire is burning or cargo smouldering in a hatch, the gang working the hatch to receive:

Straight time, per hour	\$1.15
Overtime, per hour	70c

Section 4.

The hiring of all longshoremen shall be through halls maintained and operated jointly by the International Longshoremen's and Warehousemen's Union, Pacific Coast District Number One, and the respective employer's associations. The hiring and dispatching of all longshoremen shall be done through one central hiring hall in each of the ports of Seattle, Portland, San Francisco and Los An-

Plaintiff's Exhibit 34—(Continued)

geles, with such branch halls as the Labor Relations Committee, provided for in Section 9, shall decide. All expense of the hiring halls shall be borne one-half by the International Longshoremen's and Warehousemen's Union and one-half by the employers. Each longshoreman registered at any hiring hall who is not a member of the International Longshoremen's and Warehousemen's Union shall pay to the Labor Relations Committee toward the support of the hall a sum equal to the pro rata share of the expense of the support of the hall paid by each member of the International Longshoremen's and Warehousemen's Union. [132]

Section 5.

The personnel for each hiring hall shall be determined and appointed by the Labor Relations Committee for the port, except that the dispatcher shall be selected by the International Longshoremen's and Warehousemen's Union.

Section 6.

Preference of employment shall be given to members of Pacific Coast District International Longshoremen's and Warehousemen's Union whenever available. This section shall not deprive the employers' members of the Labor Relations Committee of the right to object to unsatisfactory men (giving reasons therefor) in making additions to the registration list, and shall not interfere with the making of appropriate dispatching rules.

Plaintiff's Exhibit 34—(Continued)

Section 7.

(a) The following holidays shall be recognized: New Year's Day, Lincoln's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Armistice Day, Thanksgiving Day, General Election Day, Christmas Day, or any other legal holiday that may be proclaimed by state or national authority. When a holiday falls on Sunday the following Monday shall be observed as a holiday.

(b) Election Day. On election day the work shall be so arranged as to enable the men to vote.

Section 8.

The hiring and dispatching of longshoremen in all ports covered by this award other than those mentioned in Section 4, and excepting Tacoma, shall be done as provided for the ports mentioned in Section 4; unless the Labor Relations Committee in any of such ports establishes other methods of hiring [133] or dispatching.

Section 9.

The parties shall immediately establish and maintain during the existence of this agreement a Coast Labor Relations Committee of six members, three to be designated by the employers and three by the union. There shall also be established and maintained throughout the existence of this agreement a Port Labor Relations Committee for each

Plaintiff's Exhibit 34—(Continued)

port affected by this agreement, composed of three representatives designated by the employer's association of the port and three to be designated by the local union. By mutual consent any Labor Relations Committee may change the number of representatives of the respective parties. Any Coast or Port Labor Relations Committee shall meet promptly at the request of either party.

The Coast Labor Relations Committee shall have power and jurisdiction to determine any question involving the interpretation of this agreement and to decide any dispute arising thereunder. The Coast Labor Relations Committee shall have power to set aside any decision or other action of any Port Labor Relations Committee and shall have the power and duty to establish uniform coast working and dispatching rules for any or all of the ports affected hereby and to interpret and apply the same.

The parties shall endeavor to agree upon a Coast Arbitrator; if they cannot so agree, the Secretary of Labor or any person authorized by the Secretary shall, at the request of either party, appoint one Coast Arbitrator. Before making such appointment, the Secretary of Labor shall be requested to confer with the [134] parties. If the Coast Arbitrator shall at any time be unable or refuse or fail to act or shall resign, then at the request of either party the Secretary of Labor shall promptly appoint his successor or substitute.

Plaintiff's Exhibit 34—(Continued)

The parties, or, at the request of either of them, the Coast Arbitrator, shall select Arbitrator's Agents, one for each of the four districts of Puget Sound, Columbia River, Northern California and Southern California. All expenses of the Coast Arbitrator and of the Arbitrator's Agents and their respective compensations or salaries shall be equally borne by the parties. Each of the Arbitrator's Agents shall at all times function under and in accordance with the decisions and directions of the Coast Arbitrator. Both the Coast Arbitrator and the Arbitrator's Agents shall at all times be available for the performance of their respective functions and duties under the provisions of this agreement.

In the event that any Port Labor Relations Committee shall fail to agree on any question before it, it shall be immediately referred at the request of either party to the Coast Labor Relations Committee for decision. In the event that the Coast Labor Relations Committee fails to agree on any question involving the interpretation of this agreement or any dispute arising hereunder, or upon any other question of mutual concern not covered by this contract and relating to the industry, such question shall, at the request of either party, be referred to the Coast Arbitrator for decision. [135]

The Coast Arbitrator shall have power to hear and determine any complaint of either party concerning alleged violations of the provisions of this

Plaintiff's Exhibit 34—(Continued)

agreement and shall have power to finally and conclusively determine the same.

All meetings of the Coast Labor Relations Committee and all arbitration proceedings before the Coast Arbitrator shall be held in the City and County of San Francisco, State of California, unless the parties shall otherwise stipulate in writing. All decisions of the Coast Arbitrator shall be given in duplicate and shall be in writing signed by the Arbitrator and shall be delivered to the respective parties.

Nothing in this section shall prevent the parties from agreeing upon other means of deciding matters upon which there has been disagreement.

The Coast Arbitrator shall have power to delegate to the Arbitrator's Agents the power to hear and determine disputes arising under the contract of a local significance or character, and in such case the action of the Coast Arbitrator in delegating such authority shall be conclusive upon all parties. Arbitration proceedings before any Arbitrator's Agent shall be conducted in the same manner as proceedings before the Coast Arbitrator.

All decisions of the Coast Arbitrator and of the Arbitrator's Agents shall be final and binding upon all parties. [136]

Section 10.

Subject to the control and direction of the Coast

Plaintiff's Exhibit 34—(Continued)

Labor Relations Committee, the duties of the Port Labor Relations Committee shall be:

- (a) To maintain and operate the hiring hall;
- (b) To have complete control of the registration list of the regular longshoremen of the Port including the power to make such additional registrations of the longshoremen as may be necessary, no longshoremen not on such a list shall be dispatched from the hiring hall or employed by any employer while there is any man on the registered list qualified, ready and willing to do the work;
- (c) To decide questions regarding rotation of gangs and extra men; revision of existing lists of extra men and of casuals; and the addition of new men to the industry when needed;
- (d) To investigate and adjudicate all grievances and disputes relating to working agreements;
- (e) To decide all grievances relating to discharges. The hearing and investigation of grievances relating to discharges shall be given preference over all other business before the Committee. In case of discharge without sufficient cause, the Committee may order payment for lost time or reinstatement with or without payment for lost time;
- (f) To decide any other question of mutual concern relating to the industry and not covered by this agreement.

Plaintiff's Exhibit 34—(Continued)

Section 11.

(a) Subject to the control and direction of the Coast Labor Relations Committee, the Labor Relations Committee for each port shall determine the organization of gangs and methods [137] of dispatching. Subject to this provision and to the limitations of hours fixed in this agreement, the employers shall have the right to have dispatched to them, when available, the gangs in their opinion best qualified to do their work. Subject to the foregoing provisions gangs and men not assigned to gangs shall be so dispatched as to equalize their work opportunities as nearly as practicable, having regard to their qualifications for the work they are required to do. The Employers shall be free to select their men within those eligible under the policies jointly determined, and the men likewise shall be free to select their jobs.

(b) The longshoremen shall perform work as ordered by the employer in accordance with the provisions of this agreement. If a dispute arises concerning the manner in which work shall be carried on it shall continue in accordance with the orders of the employer, except in those cases where the longshoremen in good faith believe that to do is to immediately endanger the health and safety of the men. In all such cases the Arbitrator's Agent for the District shall be immediately summoned and shall forthwith determine the manner in which work shall be performed thereafter pend-

Plaintiff's Exhibit 34—(Continued)

ing settlement of the dispute. Any order of the Arbitrator's Agent relative to the manner in which work shall be carried on shall be binding on both parties [138] and shall be immediately complied with.

(c) The Employers shall have the right to discharge any man for incompetence, insubordination or failure to perform the work as required in conformance with the provisions of this agreement. If any man feels that he has been unjustly discharged or dealt with, his grievance shall be taken up as provided in Section 10.

(d) It is agreed that the employers shall be free so far as they desire to do so to place into immediate use all labor saving devices and labor saving equipment; and the employers shall at all times in the future be free, without interference from the union or its members, to introduce such labor saving devices and to institute such methods of loading and discharging cargo as they consider to be the best conduct of their business, provided such methods of discharging and loading are not inimical to the safety or health of the employees.

If at any time the union shall notify the employers that it contends that earnings of Registered Longshoremen and their employment have suffered materially from the introduction and use of labor saving devices and methods in addition to those already used and practiced in the past, then it is agreed that proposals relative to the

Plaintiff's Exhibit 34—(Continued)

conditions under which labor saving devices and practices shall be continued will be a proper and [139] appropriate subject for negotiation and if the parties cannot agree for arbitration before the Coast Arbitrator, upon the establishment that there is reasonable compliance with this agreement and that the following conditions then exist:

(a) That the use of labor saving devices has been materially increased beyond the uses heretofore practiced;

(b) That such increased use has materially and adversely affected the earnings and employment of Registered Longshoremen on the Pacific Coast;

(c) That the union and its members have not interfered with and are not interfering with the introduction of labor saving devices by the employers:

(d) That efficiency in longshore work has been materially improved as a result of such use.

(e) All members of the Union shall perform their work conscientiously and with sobriety and with due regard to their own interests shall not disregard the interests of their employers. Any member of the Union who is guilty of deliberate bad conduct in connection with his work as a longshoreman or through illegal stoppage of work shall cause the delay of any vessel shall be fined, suspended or for deliberate repeated offenses expelled from the Union. Any employer may file with the

Plaintiff's Exhibit 34—(Continued)

Union a complaint against any member of the Union, and the Union shall act thereon and notify the Labor Relations Committee of its decision within ten (10) days from the date of receipt of the complaint. [140]

After the expiration of ninety (90) days from this date, if the employers are dissatisfied with the disciplinary action taken under the foregoing paragraph, then the following independent procedure may be followed:

The Port Labor Relations Committee shall have the power and duty to impose penalties on long-shoremen who will be found guilty of stoppages of work, refusal to work cargo in accordance with the provisions of this agreement, or shall leave the job before relief is provided, or who shall be found guilty of pilfering or broaching cargo, or be found guilty of drunkenness, or shall in any other manner violate the provisions of this agreement or any award or decision of an arbitrator or arbitrator's agents. If any Port Labor Relations Committee shall fail to agree upon the imposition of a penalty, or the adequacy thereof, the matter shall then go before the Coast Labor Relations Committee, and if it cannot agree, the Coast Arbitrator for decision.

(f) Promptly on the execution of this agreement, the Coast Labor Relations Committee shall establish basic Coast standard dispatching and working rules as far as practicable; in the event that Committee is unable to agree upon any of the

Plaintiff's Exhibit 34—(Continued)

matters set forth in this section, the matter shall be referred to the Coast Arbitrator for decision, at the request of either party. All local port dispatching, working and safety rules in effect at this time shall continue in effect until changed or superseded in accordance with the terms of this agreement.

(g) The employers shall provide safe gear and safe working conditions. A safety code for longshore work shall be negotiated by the parties and if they shall not agree, it shall be arbitrated only by mutual consent.

(h) Loads for commodities covered herein handled by longshoremen shall be of such size as the employer shall direct, within the maximum limits hereinafter specified, and no employer after such date shall direct and no longshoremen shall be required to handle loads in excess of those hereinafter stated. The following standard maximum sling loads are hereby adopted:

(1) Canned Goods:

24—21½ talls, 6—12s tall and	
48—1 talls (including	
salmon)	35 cases to sling load
or	

when loads are built of

3 tiers of 12.....	36 cases to sling load
24—1 talls	60 cases to sling load
24—2's talls.....	50 cases to sling load
6—10's talls	40 cases to sling load
Miscellaneous cans and jars..	Maximum 2100 lbs.

Plaintiff's Exhibit 34—(Continued)

(2) Dried Fruits and Raisins—(Gross Weight):

22 to 31 lbs.....	72 cases to sling load
32 to 39 lbs.....	60 cases to sling load
40 to 50 lbs.....	40 cases to sling load
24—2 lbs.	35 cases to sling load
48—16 oz.	40 cases to sling load

(3) Fresh Fruit—Standard Boxes:

Oranges, Standard	27 boxes to sling load
Oranges, Maximum.....	28 boxes to sling load
Apples and Pears.....	40 boxes to sling load

(4) Miscellaneous Products:

Case Oil—2 5-gal. cans

(Hand hauled to or from
ship's tackle)18 cases to sling load

(Power hauled to or from
ship's tackle)24 cases to sling load

Cocoanut12 cases to sling load

Tea—Standard12 cases to sling load

Tea—Small16 cases to sling load

Copper (Large) 5 slabs to sling load

Copper (Small) 6 slabs to sling load

Copper (Bars) 9 bars to sling load

Cotton, under standard

conditions 3 bales to sling load

Rubber (1 tier on sling

maximum of10 bales to sling load

Gunnies, Large 2 bales to sling load

Gunnies, Medium 3 bales to sling load

Gunnies, Small 4 bales to sling load

Rags, large (Above 700#).. 2 bales to sling load

Plaintiff's Exhibit 34—(Continued)

Rags, medium (500 to 700#)	3 bales to sling load
Rags, small (below 500#) ..	4 bales to sling load
Sisal, large	3 bales to sling load
Hemp, ordinary	5 bales to sling load
Jute (400#) bales.....	5 bales to sling load
Pulp, bales weighing 350# or more.....	6 bales to sling load
Pulp, bales weighing 349# or less.....	8 bales to sling load
Steel drums, containing Asphalt, Oil, Etc. weighing 500# or less.....	4 to the sling load (When using Chine Hooks)
Steel drums, containing Asphalt, Oil, Etc. weighing 500# or less on board (capacity of board—1 tier) maximum of	5 drums to sling load
Barrels, wood, heavy, containing wine, lard, etc., maximum of.....	4 bbls. to sling load (When using Chine Hooks)
Barrels, wood, heavy, containing wine, lard, etc., (capacity of board— 1 tier) on board— maximum of	4 bbls. to sling load
Barrels, wood, containing Dry Milk, Sugar, etc.....	6 bbls. to sling load

Plaintiff's Exhibit 34—(Continued)

(Present port practice or gear in handling drums of asphalt or barrels shall not be changed in order to increase the load).

Newsprint, rolls 2 rolls to sling load

Newsprint, rolls 1 when Wgt. 1800#
or over

(5) Sacks:

Flour—140 lbs.15 sacks to sling load

Flour— 98 lbs.20 sacks to sling load

Flour— 49 lbs.40 sacks to sling load

Flour— 49 lbs.

(in balloon sling).....50 sacks to sling load

Cement22 sacks to sling load

Wheat15 sacks to sling load

Barley15 sacks to sling load

Coffee—Power haul from

and to ship's tackle.....12 sacks to sling load

Coffee—Hand haul from

and to ship's tackle..... 8 sacks to sling load

Other sacks—maximum 2100# to sling load

(6) When flat trucks are pulled by hand between ship's tackle and place of rest on dock, load not to exceed 1400#.

(7) Number of loaded trailers (4 wheelers)—to be hauled by jitney as follows: Within the limits of the ordinary berthing space of the vessel—2 trailers.

Long hauls to bulk head warehouse or to adjoining docks or berths—3 trailers.

Plaintiff's Exhibit 34—(Continued)

Extra long haul to separate docks or across streets—4 trailers, providing that four (4) trailers shall be used only where it is now the port practice.

- (8) When cargo is transported to or from the point of stowage by power equipment, the following loads shall apply:

48— 1 talls	40
24— 1 talls	60
24— 2's talls	48
24—2½'s talls	40
6—10's talls	50
6—12's talls	50

It is agreed that the employers will not use the maximum loads herein set forth as a subterfuge to establish unreasonable speed-ups; nor will the ILWU resort to subterfuges to curtail production.

No Port Labor Relations Committee shall have power to add to or to alter in any respect any of the maximum loads herein provided for.

Section 12.

Commencing on the date hereof and continuing during the life of this contract, the Coast Labor Relations Committee shall conduct investigations and a survey looking toward the restoration of reasonable efficiency (excluding comparisons prior to January 1, 1935) in the performance of longshore work and reasonable compliance with the provisions of this contract which the union agrees to provide and maintain during the life of this agreement.

Plaintiff's Exhibit 34—(Continued)

On February 1, 1941, a wage review shall be conducted of the basic straight and overtime wage rates specified in Section 3 hereof, the Employers agreeing that if by that date reasonable rates of production and efficiency (excluding comparisons prior to January 1, 1935) have been restored and reasonable compliance with this contract has been provided by the Union, a wage increase in addition to the basic wage rate set forth in Section 3 amounting to 5c per hour straight time and 10c per hour overtime shall be granted.

Said date of February 1, 1941 for such wage review is conditioned upon the execution of this agreement on or before December 1, 1940, and if the execution thereof shall be delayed at the request of the Union, then the date of such wage review shall be corresponding deferred.

It is further agreed that if the Employers shall refuse to grant such increase, the matter shall at the request of the Union be referred to the Coast Arbitrator who shall determine in conjunction with the efficiency then prevailing and reasonable compliance [145] then provided, whether such increase shall be granted.

Semi-annually thereafter, the rates of pay and overtime rates prevailing shall, at the request of either party be reviewed, and if the parties cannot agree shall at the request of either party be determined by the Coast Arbitrator, and in all such wage reviews wage levels shall be considered in conjunc-

Plaintiff's Exhibit 34—(Continued)

tion with the obligation of the Union to provide reasonable compliance with the provisions of this agreement.

In Witness Whereof, the parties hereto through their representatives duly authorized have executed this agreement on the 20th day of December, 1940, in the City and County of San Francisco, State of California.

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST.

Acting on behalf of:

Waterfront Employers of Washington, Waterfront Employers of Portland, Waterfront Employers' Association of San Francisco, Waterfront Employers' Association of Southern California.

By /s/ W. J. BUSH
/s/ JOHN CUSHING
/s/ HUGH GALLAGHER
/s/ JOS. A. LUNNY
/s/ F. P. FOISE
/s/ J. B. BRYAN
/s/ F. C. GREGORY
/s/ A. BOYD
/s/ J. B. BRYAN
/s/ F. C. GREGORY
/s/ A. BOYD

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION DISTRICT
NO. 1.

By /s/ H. R. BRIDGES
/s/ MATT MEEHAN [146]

Plaintiff's Exhibit 34—(Continued)

Supplemental Agreement

This agreement made by and between International Longshoremen's & Warehousemen's Union District 1 and Waterfront Employers Association of the Pacific Coast acting on behalf of members engaged in the steam schooner trade on the Pacific Coast:

Witnesseth:

That the award of the National Longshoremen's Board of October 12, 1934 as amended by agreements between the parties thereto and as amended in the foregoing agreement, shall govern longshore work on steam schooners operated by members of the Waterfront Employers Association of the Pacific Coast; provided, however, that members of crew of steam schooners may perform cargo work properly within the scope of their duties, that neither the Union nor the Employers shall be committed with reference to scope or nature of the duties of longshoremen or members of the crews of steam schooners, but any dispute relating thereto shall be determined by the Coast Labor Relations Committee created under such agreement in accordance with the procedure set forth in Section 9 thereof; and any decision of the Coast Labor Relations Committee, or, if the members thereof cannot agree, of the Coast Arbitrator, shall be final and binding. The provisions of said agreement do not apply to wages or working conditions of crews on steam

Plaintiff's Exhibit 34—(Continued)

schooners during such time as they are working cargo.

In witness whereof, the parties hereto through their representatives duly authorized have executed this agreement on the 20th day of December, 1940, in the City and County of San Francisco, State of California. [148]

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST.

By /s/ F. P. FOISIE

President.

/s/ A. BOYD,

Secretary.

Acting on behalf of:

Waterfront Employers of Washington, Waterfront Employers of Portland, Waterfront Employers' Association of San Francisco, Waterfront Employers' Association of Southern California.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION DISTRICT
NO. 1.

By /s/ H. R. BRIDGES

President.

/s/ MATT MEEHAN. [159]

This Agreement by and between the International Longshoremen's and Warehousemen's Union, District No. 1, hereinafter designated as the Union, and the Waterfront Employers Association of the Pa-

Plaintiff's Exhibit 34—(Continued)

cific Coast on behalf of the Waterfront Employers of Washington, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco and Waterfront Employers' Association of Southern California, hereinafter designated as the Employers:

Witnesseth:

The parties hereto having made an agreement of even date herewith concerning longshore work at Pacific Coast ports (which agreement is referred to as the "longshore contract") do hereby renew that certain Supplementary Memorandum dated September 30, 1938, a copy of which is attached, for the full term of said longshore contract.

In Witness Whereof, the undersigned have executed the foregoing agreement on this 20th day of December, 1940, in the City and County of San Francisco, State of California.

**WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST.**

By /s/ F. P. FOISIE
President.

/s/ A. BOYD,
Secretary.

Acting on behalf of:

Waterfront Employers of Washington, Waterfront Employers of Portland, Waterfront Employ-

Plaintiff's Exhibit 34—(Continued)

ers' Association of San Francisco, Waterfront Employers' Association of Southern California.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION DISTRICT
NO. 1.

By /s/ H. R. BRIDGES
President.

/s/ MATT MEEHAN. [150]

Supplementary Memorandum.

The Agreement by and between The International Longshoremen's and Warehousemen's Union, District No. 1, hereinafter designated as the Union, and the Waterfront Employers Association of the Pacific Coast on behalf of the Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco and Waterfront Employers' Association of Southern California, hereinafter designated as the Employers;

Witnesseth:

The I. L. & W. U. agrees not to assert its rights to preference of employment for I. L. & W. U. members in the ports of Tacoma, Anacortes, Port Angeles and Olympia until such time as it is satisfactorily established that a majority of the longshoremen on the registration lists in such ports as of this date are members of the I. L. & W. U.

Plaintiff's Exhibit 34—(Continued)

The I. L. & W. U. shall not be held responsible for disciplining of longshoremen in these ports but reserves the right to intervene in case of any discrimination against any member of the I. L. & W. U. in order to protect his rights under the aforesaid contract. The provisions of this paragraph shall in no way abridge the powers of the Labor Relations Committee in said ports.

This memorandum shall in no way constitute a waiver of the rights of the I. L. & W. U., District No. 1 [151] under the decision of the National Labor Relations Board dated June 21st, 1938, and it is clearly agreed that it is not the intent of the parties in any way to change or modify the collective bargaining unit as defined in above said decision, or in any way to affect the rights of the I. L. & W. U. with respect to representation and collective bargaining; on the contrary, the agreement above referred to covers all the longshore work in all of the areas defined by said decision of the N. L. R. B.

In Witness Whereof, the undersigned have executed the foregoing agreement on this 30th day of September, 1938 in the City and County of San Francisco, State of California.

**WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST.**

By A. E. ROTH,
President.

Plaintiff's Exhibit 34—(Continued)

Acting on behalf of:

Waterfront Employers of Washington, Waterfront Employers of Portland, Waterfront Employers' Association of San Francisco, Waterfront Employers' Association of Southern California.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION DISTRICT
NO. 1.

By /s/ H. R. BRIDGES

President. [152]

By this memorandum the undersigned agree that they will enter into negotiations looking toward a coastwise agreement relative to work performed by employees of member companies of the Waterfront Employers Association of the Pacific Coast in the indirect movement of cargo. The scope of such agreement shall be included in the negotiations.

If negotiations shall fail, the issues may be arbitrated if the parties consent.

All work covered thereby will be that performed by members of the International Longshoremen's and Warehousemen's Union, and preference of employment for the International Longshoremen's and

Plaintiff's Exhibit 34—(Continued)

Warehousemen's Union will be part of any agreement to be made.

By /s/ F. P. FOISIE

President.

/s/ A. BOYD,

Secretary.

Waterfront Employers Association of the Pacific Coast.

By /s/ H. R. BRIDGES,

President.

International Longshoremen's and Warehousemen's Union District No. 1

/s/ MATT MEEHAN .

Dated: December 20th, 1940. [153]

PLAINTIFF'S EXHIBIT 36.

Admitted Mar. 23, 1945.

Excerpts from Minutes of Joint Annual Meeting of the Board of Directors of the Waterfront Employers Association of the Pacific Coast and the Waterfront Employers Association of California.

February 9, 1944—10:00 a.m.

Room 310—Financial Center Building

Members Present:

Messrs. C. Winkler, A. E. Stow, A. J. Chalmers, T. C. Greene, W. J. Bush, W. T. Sexton, J. J.

Walsh, L. P. Bailey, Ralph W. Myers, W. D. Clark, Hugh Gallagher, J. B. Banning, Chas. Tilley.

Ex Officio Members:

R. C. Clapp, Chas. Spear, Sam Stocking, E. C. Davis, Geo. Schirmer, T. W. Buchholz, Tom James, Clayton Jones, Chas. Howard.

Also Present:

Messrs. F. P. Foisie, K. J. Middleton, B. O. Pickard, William Marlowe, A. Boyd, Gregory A. Harrison, M. G. Ringenberg, J. B. Bryan, F. C. Gregory.

Purpose of Meeting.

Consideration of Docket, copy of which is attached and made a part of these Minutes. [154]

Delinquencies: Mr. Foisie reported that remittance had been recently received from the Coos Bay stevedores paying the Association's coastwise tonnage tax after deducting hiring hall expenses.

Mr. Middleton read excerpts from letters and the Minutes of the Seattle trustees with reference to tonnage assessment and hiring hall expenses from Mr. Hill who spoke for the Twin Harbors and Grays Harbor Stevedoring Company and the Olympic Stevedoring Company. Mr. Middleton indicated that Mr. Hill had made a remittance to cover the tonnage tax for 1943 after deducting hiring hall and port expenses and that the check in payment thereof had shown the endorsement "Payment in full for 1943" but that further investiga-

tion should be made as to whether any previous years tonnage tax was due and also examination should be made of just what the hiring hall expenses cover.

Mr. Harrison reported in connection with the remittance by Griffiths & Sprague of settlement and a check for \$17,000 sent to Mr. James in San Francisco with an accompanying letter stating that the above amount covered the 1943 tonnage tax of Griffiths & Sprague at $1\frac{1}{4}$ c per ton, instead of the $2\frac{1}{2}$ c regulation tax per ton, and that the check covering the remittance bore an endorsement: "In full payment of 1943 Tonnage Assessments", that the letter asked Mr. James to endeavor to secure for Griffiths & Sprague, through the Association, some relief of the regular tonnage assessments. He stated that Mr. Dobrin, association counsel in Seattle, was in doubt whether the Association should deposit the check and dispute the inadequacy of it later or return the check and take the position that the assessment should be paid in full. [155]

Mr. Middleton reported regarding the suit against Western Stevedore Company's delinquency in Seattle, that suit had been filed; that default judgment was about to be requested and that Western Stevedore had agreed before he left Seattle to pay up their tonnage assessment in full.

Mr. Foisie summed up the assessment and hiring hall problem with the outports in the Oregon-Washington areas, recommending that all contracting stevedores in these outports pay the Associa-

tion's tonnage assessments in full and that in the future that the hiring hall expenses in those ports be paid by the contracting stevedores and reimbursed by the Association subject to the Association's control of said expenditures. That the Association would at all times help a resident stevedore in such outports but that it could not be party to blocking other stevedores from working said ports if the Association shares in the payment of the expenses of the hiring hall. He recommended that Association counsel draft the necessary instructions to carry out these proposals to be transmitted to the stevedores in the Oregon-Washington outports and Bar Harbors.

Upon motion duly made and seconded, the following Resolution was unanimously adopted:

Be It Resolved, That it be the order of this Board that the recommendations regarding payment of assessments by stevedores in the Washington-Oregon outports and Bar Harbors and the payment by the Association of the proper proportion of the hiring hall expenses in said outports and Bar Harbors be carried out as recommended and that counsel for the Association be instructed to draft the necessary instructions to be transmitted to the stevedores in said Washington-Oregon outports and Bar Harbors to carry out the said recommendations and this order of the Board. [156]

Change in Assessments.

The representatives of the Washington Asso-

ciation having presented to the Board the suggestion that the system of assessments be converted from tonnage to manhours, the issue was discussed in a number of phases at some length after which, upon the motion of Mr. Doelker, second by Mr. Clapp, the following Resolution was unanimously adopted:

Be It Resolved, that a Committee be appointed to study the entire subject of coastwise assessments for this Association, acting on the suggestion of the Washington Association that the system of assessments be converted from tonnage to a manhour basis, and that this said Committee meet as soon as practical and report back to this Board.

The Committee appointed by the chair to study the change in assessment proposals was Messrs. W. J. Bush, Tom James, W. T. Sexton, R. C. Clapp and Sam Stocking.

Meeting adjourned at 12:10 p.m.

/s/ A. BOYD,

Secretary.

This is to certify that I have carefully compared the transcript, to which this certificate is attached, with the record on file in this office of which it purports to be a copy, and that the same is a full, true and correct copy thereof.

/s/ A. BOYD,

Secretary-Treasurer.

Waterfront Employers Association of the Pacific Coast.

Dated at San Francisco, this 10 day of August, 1944. [157]

DOCKET

Annual Meetings of Coast and California Associations—Wednesday, February 9, 1944

10:00 a.m.—Coast Directors meet.

(1) Report from Ports:

Washington—Mr. Middleton;

Oregon—Mr. Chalmers;

San Francisco—Mr. Gregory;

Southern California—Mr. Banning.

(2) Distribution of cargoes between the several ports;

What is being done to steady the load?

What can be added if and as the war shifts to the Pacific?

(3) Subsistence allowance to longshoremen when working away from home port;

And review of transporting longshoremen between ports.

(4) Progress on delinquencies;

(a) Payment by Coos Bay, Grays and Twin Harbors and Olympia Stevedoring Co.; with employer's Hiring Hall expense borne by the Coast Association;

(b) Griffiths & Sprague tender of partial payment;

(c) Suit against Western Stevedore Co.;

(d) San Francisco Army Port of Embarkation still unpaid. [158]

(5) Suggestion from Washington Association

that the Coast system of assessment be converted from tonnage to man-hours.

(6) Report on the work of the M. I. B.

Lunch—12:15 p.m.—Commercial Club.

How many will not be present?

2:00 p. m.—Membership Joint Meeting of the Coast and California Associations.

Word from the Pacific Coast head of the War Shipping Administration on where we are and what's ahead—John E. Cushing;

The National Federation of American Shipping—Frazer A. Bailey;

A Review of Shipping's Relationships with Government During the War—E. Russell Lutz;

Financial Reports—Coast and all port associations are on a sounder financial basis than at any time thus far;

Recommended that the remaining indebtedness to our members of \$36,000, borrowed since 1937, be paid.

Election of Directors and officers—Report of Nominating Committee: Messrs. Ewing, Greene, Gallagher, James, Mills.

3:30 p.m.—New Boards of Directors meet:

Election of officers and Executive Committee.

This is to certify that I have carefully compared the transcript to which this certificate is attached, with the record on file in this office of which it

purports to be a copy, and that the same is a full, true and correct copy thereof.

/s/ A. BOYD,

Secretary Treasurer.

Waterfront Employers Association of the Pacific Coast.

Dated at San Francisco this 10th day of August, 1944. [159]

PLAINTIFF'S EXHIBIT 41

ruling reserved Mar. 23, 1945.

objection withdrawn and admitted Mar. 23, 1945.

1943

(All Member Companies)	Ship	Dock
Total man hours for the Puget Sound District	3,199,313	2,290,700
Total man hours for "Griffiths Company" (same district)	1,349,369	345,841

1943

BREAK-DOWN OF GRIFFITHS COMPANY "MAN HOURS" FOR PUGET SOUND DISTRICT

	Port of Seattle	Port of Tacoma	Port of Everett
January	69,734 (Ship)	3,042 (Ship)	1081¼ (Ship)
.....	21,840½ (Dock)	490½ (Dock)	59 (Dock)
February ..	106,015¾ (S)	4,020¾ (S)	72 (S)
..	30,783¾ (D)	1,730¾ (D)	16 (D)
March	112,033¼ (S)	1,457 (S)	.... (S)
.....	28,511½ (D)	50 (D)	.... (D)
April	107,815 (S)	33 (D)	.... (S)
.....	30,311¼ (D)	686 (S)	.... (D)
May	131,292½ (S)	12,509½ (S)	894 (S)
.....	30,665⅛ (D)	233¾ (D)	341¾ (D)
June	114,382¾ (S)	361 (S)	.... (S)
.....	32,830¼ (D)	46 (D)	.... (D)
July	115,435½ (S)	9,540 (S)	945½ (S)
.....	23,350½ (D)	3,019½ (D)	341 (D)
August	108,511¾ (S)	4,157½ (S)	.... (S)

	Port of Seattle	Port of Tacoma	Port of Everett
.....	19,957 $\frac{1}{4}$ (D)	757 $\frac{1}{2}$ (D)	.... (D)
September	135,529 $\frac{3}{4}$ (S)	918 (S)	.... (S)
	38,066 $\frac{1}{4}$ (D)	..... (D)	.... (D)
October	127,004 $\frac{3}{4}$ (S)	2,965 $\frac{1}{2}$ (S)	761 $\frac{1}{2}$ (S)
.....	37,351 (D)	530 $\frac{1}{2}$ (D)	.... (D)
November ..	92,260 $\frac{1}{4}$ (S)	4,340 $\frac{1}{4}$ (S)	.... (S)
..	36,018 $\frac{1}{2}$ (D)	468 $\frac{1}{4}$ (D)	.... (D)
December ..	70,476 $\frac{1}{4}$ (S)	3,105 (S)	.... (S)
..	20,093 $\frac{3}{4}$ (D)	339 (D)	.... (D)

PLAINTIFF'S EXHIBIT 42

Admitted Mar. 23, 1945.

1944

(All Member Companies)	Ship	Dock
Total man hours for the Puget Sound District	3,554,026	3,097,928
Total man hours for "Griffiths Company" (same district)	1,531,128	479,875

1944

BREAKDOWN OF GRIFFITHS COMPANY "MAN HOURS" FOR PUGET SOUND DISTRICT

	Port of Seattle	Port of Tacoma	Port of Everett
January	120,354 (Ship)	3,042 (Ship)	1081 $\frac{1}{4}$ (Ship)
....	33,295 $\frac{1}{4}$ (Dock)	490 $\frac{1}{2}$ (Dock)	59 (Dock)
February ..	122,339 $\frac{1}{2}$ (S)	1,259 $\frac{1}{2}$ (S)	.... (S)
..	33,709 $\frac{1}{2}$ (D)	254 $\frac{3}{4}$ (D)	.... (D)
March	160,564 $\frac{3}{4}$ (S)	156 (S)	.... (S)
.....	35,835 $\frac{1}{2}$ (D)	..... (D)	.... (D)
April	152,001 (S)	1,621 $\frac{1}{2}$ (S)	.... (S)
.....	42,557 $\frac{1}{2}$ (D)	71 $\frac{1}{2}$ (D)	.... (D)
May	177,201 (S)	1,783 (S)	.... (S)
.....	46,813 (D)	80 (D)	.... (D)
June	94,284 $\frac{3}{4}$ (S)	..... (S)	.... (S)
.....	47,196 $\frac{3}{4}$ (D)	..... (D)	.... (D)
July	146,558 (S)	..... (S)	.... (S)
.....	46,535 (D)	..... (D)	.... (D)
August	134,221 (S)	..... (S)	.... (S)
.....	57,700 (D)	..... (D)	.... (D)
September	131,447 (S)	..... (S)	.... (S)
	63,565 (D)	..... (D)	.... (D)

	Port of Seattle	Port of Tacoma	Port of Everett
.....	31,769 (D)	..... (D)	.... (D)
October	128,162 (S)	..... (S)	.... (S)
.....	31,769 (D)	..... (D)	.... (D)
November ..	"Griffiths Company" failed to make any reports for this month.		
December ..	156,136 (S)	..... (S)	.... (S)
..	40,006 (D)	..... (D)	.... (D)

PLAINTIFF EXHIBIT 43

Admitted Mar. 23, 1945.

1943

Total Seattle Man Hours—Ship & Dock (Seattle)
Griffiths Man Hours (Seattle)—Ship & Dock (Seattle)

1943

		Ship	Dock
January	Total Seattle man hours (For all Member Companies)	167,737 $\frac{3}{4}$	149,868
January	(For Griffiths Co.	69,734	21,840 $\frac{1}{2}$
February	(Total (Seattle)	188,384	175,927
February	(Griffiths Co. (Seattle)	106,015	30,783
March	(Total	235,408 $\frac{3}{4}$	186,992 $\frac{1}{2}$
March	(Griffiths Co.	112,033 $\frac{1}{4}$	28,511 $\frac{1}{2}$
April	(Total	200,971	170,107 $\frac{3}{4}$
April	(Griffiths Co.	107,815	30,311 $\frac{1}{4}$
May	(Total	217,972	174,722 $\frac{3}{8}$
May	(Griffiths Co.	131,292 $\frac{1}{2}$	30,665 $\frac{1}{8}$
June	(Total	206,883 $\frac{3}{4}$	192,619
June	(Griffiths Co.	114,382 $\frac{3}{4}$	32,830 $\frac{1}{4}$
July	(Total	248,869 $\frac{1}{2}$	164,922
July	(Griffiths Co.	115,435 $\frac{1}{2}$	23,350 $\frac{1}{2}$
August	(Total	223,376 $\frac{1}{4}$	129,092 $\frac{3}{4}$
August	(Griffiths Co.	108,511 $\frac{3}{4}$	19,957 $\frac{1}{4}$
September	(Total	242,771 $\frac{3}{4}$	137,692
September	(Griffiths Co.	133,529 $\frac{3}{4}$	38,066 $\frac{1}{4}$
October	(Total	183,324 $\frac{1}{4}$	128,273 $\frac{3}{4}$
October	(Griffiths Co.	127,004 $\frac{3}{4}$	37,351
November	(Total	170,113	115,453
November	(Griffiths Co.	92,260	36,018
December	(Total	145,039	119,403 $\frac{3}{4}$
December	(Griffiths Co.	70,476 $\frac{1}{4}$	20,093 $\frac{3}{4}$

PLAINTIFF'S EXHIBIT 44

Admitted Mar. 23, 1945.

1944

Total Man Hours for (Seattle)....Ship & Dock
 Griffiths Co. (Man Hours) (Seattle)....Ship & Dock

1944

		Ship	Dock
January	(Total (Seattle)		
	All Companies	179,824	158,790
January	(Griffiths Co.	120,354	33,295
February	(Total (All Member		
	Companies)	182,648 $\frac{1}{4}$	135,984
February	(Griffiths Co.	122,339 $\frac{1}{2}$	33,709 $\frac{1}{2}$
March	(Total	219,781 $\frac{3}{4}$	176,889 $\frac{1}{4}$
March	(Griffiths Co.	160,564 $\frac{3}{4}$	35,835 $\frac{1}{2}$
April	(Total	228,696 $\frac{3}{4}$	169,964 $\frac{1}{4}$
April	(Griffiths Co.	152,001	42,557 $\frac{1}{2}$
May	(Total	256,260 $\frac{1}{4}$	206,200
May	(Griffiths Co.	177,201	46,813
June	(Total	181,781	199,524 $\frac{3}{4}$
June	(Griffiths Co.	94,284 $\frac{3}{4}$	47,196 $\frac{3}{4}$
July	(Total	250,217 $\frac{3}{4}$	215,941 $\frac{7}{8}$
July	(Griffiths Co.	146,558	46,535
August	(Total	250,868 $\frac{1}{4}$	205,180
August	(Griffiths Co.	134,221	57,700
September	(Total	226,781 $\frac{1}{2}$	221,219
September	(Griffiths Co.	131,447	63,565
October	(Total	189,607 $\frac{1}{4}$	178,294
October	(Griffiths Co.	128,162	31,769
November	(Total	66,399 $\frac{3}{4}$	151,353 $\frac{1}{4}$
November	(Griffiths Co. No recoorts.....		
December	(Total	214,025 $\frac{3}{4}$	208,908 $\frac{3}{4}$
December	(Griffiths Co.	156,136	40,006

PLAINTIFF'S EXHIBIT 46

Admitted Mar. 27, 1945.

1943

Percentage Study Port Expense
Compared with Port Tonnage

Col. 1	Col. 2	Col. 3	Col. 4	Col. 5
	*Coast Assn. Port Admin- istration Hir- ing Hall and Port Safety	%	Tonnage	%
Seattle	\$ 56,197.18	23.4	3,024,042**	16.1
Portland	39,873.05	16.5	2,325,358	12.4
San Francisco	91,846.48	38.3	9,876,947	52.8
So. Calif.	52,290.66	21.8	3,511,363	18.7
Total	\$240,207.37	100.0	18,737,710	100.0

(*) Excludes all Head Office expense (Safety, administrative, legal & arbitration) totaling.... \$83,629.52

(**) By adding 1,389,161 tons unreported by Griffiths & Sprague the % in Col. 5 would be 22, 11.6, 49.3, 17.1, respectively. [164]

1944

Percentage Study Port Expense
Compared with Port Tonnage

Col. 1	Col. 2	Col. 3	Col. 4	Col. 5
	*Coast Assn. Port Admin- istrative, Hir- ing Hall and Port Safety	%	Tonnage	%
Seattle	\$ 77,180.43	27.5	2,592,168**	12.7
Portland	47,895.05	17.0	2,812,725	13.8
San Francisco	88,065.91	31.3	9,861,670	48.3
So. Calif.	67,942.20	24.2	5,147,363	25.2
Total	\$281,083.59	100.0	20,413,926	100.0

(*) Excludes all Head Office expense (Safety, administrative, legal and arbitration) totaling....\$121,281.35

(**) By adding 1,589,681 tons unreported by Griffiths & Sprague the % in Col. 5 would be 19, 12.8, 44.8, 23.4, respectively. [165]

DEFENDANT'S EXHIBIT A

Admitted Mar. 27, 1945

Phone Exbrook 3913

Waterfront Employers Association
of the Pacific Coast
Financial Center Building
405 Montgomery Street
San Francisco, Cal.

February 2, 1943

Budget and Finance Committee:

Messrs. W. J. Bush, Hugh Gallagher, T. C. Greene, Thomas James, J. A. Lunny.

The assessment policy and procedure of this Association has served as acceptably as any taxation is ever likely to be acceptable ever since the Association was formed. The tax has been uniform, simple and evenly applied to all cargoes and all members. There has been no refusal to pay until now; even though the war has converted practically all cargoes from commercial to war.

All cargo handled carries a base tonnage assessment of $2\frac{1}{2}\text{c}$ for the support of the Associations, Coast and port. What commercial cargoes remain, bear the assessment. Provision was made in War Shipping Administration and Lend-Lease contracts for the payment of the Association's assessments through provision in the fixed fee to member companies. The Army Transport Service in San Francisco is the only instance in which the Government does its own cargo-handling with the use of our

longshoremen and is committed to meeting its share of the cost.

The 2½c per ton assessment was, prior to the war, paid by the steamship members; with contract stevedores as associate members undertaking to collect the same assessment from non-member steamship companies and in all cases doing so.

In all ports on this Coast but Washington, the stevedores allowed in their contracts for the Association assessments and are remitting regularly and in full.

In Washington ports this collection of assessments, it appears, has been carried out on all cargoes but Army. These contracts are competitive. Some of the Stevedores in Washington ports are delinquent on War Shipping Administration, Lend-Lease and commercial cargoes. [166]

Stevedores in Washington ports sought relief last November on payment of the assessment on Army and Navy cargoes by asking the Coast Association to:

1. Assess those companies who do stevedoring work on the dock a share of the tax;
2. Reduce the tonnage tax payable by the stevedore and terminal cargo-handling companies by some contribution from the shipping companies.

The Coast Board meeting with the stevedoring representatives declined to change the assessment policy, but concurred in the proposal to ask that

companies who split the stevedoring contract by handling cargo to and from the ship in Washington ports (unlike the practice in other ports) share in the assessment.

The Washington trustees concurred with the Coast Board in agreeing that the delinquencies should be met. The Washington trustees advocated that companies doing Army and Navy work to ship-side should share the tonnage assessment; the Coast trustees agreeing if the Seattle member companies were willing. The Washington trustees differed from the Coast trustees in that they believe the steamship companies should contribute a part of the assessment rate.

After thorough investigation and many conferences, it appears that the Coast Association is confronted with either giving the program of the Washington trustees a trial or face a possible withdrawal by that Association from the Coast fold.

It is recommended that the resolution of the trustees of the Waterfront Employers of Washington of November 24, 1942, be concurred in by the Board of Directors of the Coast Association as a working program for adapting the uniform Coast tonnage assessment to the conditions prevailing among Washington stevedores handling Army and Navy tonnage.

The reasons supporting such recommendation are:

It is their proposal;

It is based on producing the equivalent of the Coast uniform 21½¢ assessment;

It may bring relief to the contract stevedore;

The working out of the proposal is almost entirely in their own hands, with help from the Coast Association;

There is prospect (though not assurance) that the proposal will work out satisfactorily.

It is our understanding of the proposal, and the basis of this recommendation, that:

It is limited to the Waterfront Employers of Washington (to be extended later to Oregon if successfully worked out in Washington);

It applies only to Army and Navy commodity contract work (commercial, War Shipping Administration and all Lend-Lease contract work continues to carry the obligation of the stevedore to pay the 21½¢ per ton).

The salient facts on which the Washington Association proposal is based are:

That it is equitable for those doing cargo-handling on the dock to share the burden of the tax with those who do the cargo-handling on the ship, thus putting this combined operation on a basis comparable with the custom in other ports on the Coast:

Concerning the work done on docks for Army and Navy, the companies concerned and their estimated proportions of work are as follows:

	Army	Navy
Ames Terminal	10%	
Matson Terminal	10%	
Luckenbach Terminal		10%
Western Stevedore	40%	
Rothschild Stevedore	25%	90%
Everett Stevedore	10%	
Griffiths and Sprague	5%	

(Griffiths and Sprague do practically all Army stevedoring on ship; Rothschild all Navy stevedoring on ship and most of it on the dock; since January 1, 1943, Western Stevedoring is doing Army work in Tacoma.) [168]

On the request of the stevedores that steamship compaines contribute because they have a vital interest in continuing the Association through the war in order that it may be able to serve after the war, the largest steamship operator, the Alaska Steamship Company, is agreeable to a moderate contribution per ship; other steamship companies operating in Washington ports may be willing to go along.

Delinquency is a more difficult problem to solve because the ability to pay may be at stake as well as the willingness to accept the obligation. The Washington Association proposed that the stevedores doing the Army and Navy work, meet the tonnage assessment to January 1, 1942. To that extent the Coast and Washington Associations are in agreement. The Washington Association proposes that the "delinquency" for 1942 shall be met by sharing the assessment between the stevedore

companies doing the ship work and stevedore and terminal companies doing dock work.

There seems no reasonable prospect of securing consent of other stevedore companies to say nothing of terminal companies to any "retroactive" contributions. There likewise seems no likelihood that the shipping companies would contribute toward the 1942 delinquency. We seem to have reached the point when recourse must be had to suit; but the time for making this decision would seem to be after getting the Coast and Washington Associations in agreement.

The objective to be attained is to reconcile the positions of the Washington and Coast Boards expressed in the attached resolutions if this is possible. These seem in conflict on paper, but the foregoing program offers a possibility of working them out harmoniously. If we reach common ground between the two Associations, difficulty with recalcitrant members can be met more effectively by local and Coast Associations working together. If there is to be a break, it is far better that this should be between the combined Associations and the recalcitrant members than a split between the Associations.

Should the Washington trustees be unable to carry out their own proposals with their members, then the uniform Coast assessment policy should be reestablished for Washington ports as for all others.

(Signed)

F. P. FOISIE [169]

DEFENDANT'S EXHIBIT B

Admitted Mar. 27, 1945.

Minutes of Meeting of Budget and Finance Committee of the Waterfront Employers Association of the Pacific Coast.

February 2, 1943—11:00 a.m.

Mr. Foisie's office.

Present: Messrs. W. J. Bush, Tom James, T. C. Greene, Hugh Gallagher.

Also Present: Messrs. F. P. Foisie, A. Boyd.

Purpose of Meeting: Discussion of Assessments and other affairs in Seattle area.

Mr. Foisie presented under date of February 2 a letter addressed to the Budget and Finance Committee regarding the situation in the Northwest, copy of which is attached and made a part of these minutes.

Mr. Foisie also read a letter from K. J. Middleton setting forth his position, which was discussed.

Following is the consensus of opinion of the Executive Committee:

The tonnage assessment of $2\frac{1}{2}c$ per ton on all cargo handled by them other than commercial cargo handled for member steamship companies, must be met by the contracting stevedores performing the work;

The Committee has no objection to the contracting stevedores getting relief from other stevedore

companies performing part of the operation from the first or last place of rest on the dock to ship's side or vice versa;

That this association will not obligate itself to advise the terminal operators that they must contribute to the assessment;

That this association does not agree that the steamship companies members of the association must be forced to voluntarily contribute a portion of the 2½¢ tonnage assessment;

That Mr. Foisie on his next visit to Seattle endeavor to discuss the issue with Mr. Kenneth Coleman and D. K. McDonald to secure their influence in an effort to smooth the Seattle situating regarding assessments;

That it be made clear to the Seattle Trustees the position of the Coast Board in regard to the assessment and collection of tonnage assessments as set forth above but that Mr. Foisie do not appear before the Seattle Trustees in this matter, but endeavor to have either Lawrence Bogle or A. R. Lintner convey to the Seattle Trustees the Coast Board's position;

That Mr. Foisie arrange a meeting as soon as possible in San Francisco for the Executive Committee with A. R. Lintner to discuss the issues.

Meeting adjourned at 12:15 p.m.

A. BOYD,

Secretary. [170]

DEFENDANT'S EXHIBIT C

Admitted Mar. 27, 1945.

Waterfront Employers Association
of the Pacific Coast
Financial Center Building
405 Montgomery Street
San Francisco 4, Calif.

November 16, 1944

(Registered Mail)

To the Members:

Standard Practice for Reporting Tonnage and
Assessment Rates on War Cargoes

Attached, effective December 1, 1944, is the rate and method of reporting tonnage on war cargoes adopted by the Board of Directors November 8, 1944.

As a matter of background, the reason for the Board establishing a uniform practice is due to certain war changes that have taken place, both in the source of collecting tonnage assessments and the method used by members in reporting. Formerly, with minor exceptions, all tonnage was reported to the Association and assessments paid by member steamship companies, contracting stevedores paying on no cargo other than such non-member tonnage handled by them.

Now, the contracting stevedores and the steamship companies performing stevedoring have assumed the obligation to protect the Association for

tonnage assessments. Virtually all cargoes now moving are for the Army, Navy, WSA or Lend-Lease. These cargoes are not handled on a uniform basis; in some instances the 2,000 pound ton weight is used and other the 2,240 pound ton weight, and also the measurement ton of 40 cubic feet.

There has not been a uniform practice in reporting tonnage to the Association; some have converted to the 2,000 pound [171] weight ton and other have used the long ton. The Board thought it advisable, in order to establish an equitable uniform practice, to write a new formula for reporting and paying tonnage whereby assessments are paid to the Association on the same tonnage basis on which stevedoring is paid.

The Board further resolved that no adjustments shall be made for past inequities in reporting tonnage and paying assessments prior to December 1, 1944.

This change will in no way affect the reporting and paying of assessments on commercial cargo under the long established practice now in effect.

A. BOYD,

Secretary-Treasurer.

Waterfront Employers Association of the Pacific Coast.

AB:IM

Attachment [172]

Waterfront Employers Association
of the Pacific Coast
Financial Center Building
405 Montgomery Street
San Francisco 4, Cal.

November 16, 1944

(Registered Mail)

Members:

By Resolution of the Board of Directors, effective December 1, 1944, the standard practice for reporting tonnage and paying assessments to the Association on war cargoes for the Army, Navy, War Shipping Administration, Lend-Lease or other government agency loaded or discharged at all U. S. Pacific Coast Ports (except Alaska ports) will be as follows:

All cargo handled on weight or measusement basis, $2\frac{1}{2}c$ per ton.

Note:

Companies stevedoring cargoes should report tonnage and pay assessments on the same basis they are paid; that is, if the stevedoring is performed and paid for on a basis of 2,000 pounds to the ton, tonnage should be reported as 2,000 pounds equals 1 ton; if on the basis of 2,240 pounds to the ton, tonnage should be reported as 2,240 pound equals 1 ton; if on a measurement basis, tonnage should be reported as 40 Cubic feet equal one ton.

When reimbursement for loading or discharging certain cargoes is not by weight or measurement,

but on a men-hour basis, the weight of such cargo can be obtained from the cargo agent (berth agent), and the tonnage reported for assessment purposes on the basis of 2,240 pounds to the ton. When not obtainable the weight of such cargo to be estimated and tonnage reported on the basis of 2,240 pounds to the ton.

A. BOYD,

“ Secretary-Treasurer.

Waterfront Employers Association of the Pacific Coast.

AB:IM [173]

DEFENDANT'S EXHIBIT D

Admitted Mar. 27, 1945.

Phone EXbrook 3913

Waterfront Employers Association
of the Pacific Coast
Federal Reserve Bank Building
Sansome at Sacramento Street
San Francisco, Cal.

February 15th, 1940

It is the recommendation of the Stevedoring Committee—

1. That all contracting stevedores and steamship lines, members of the Waterfront Employers Association of the Pacific Coast or of the Port Associations, be furnished with a full and complete membership list of the members of the Waterfront

Employers Association of the Pacific Coast and of each of the four Port Associations;

2. That member contracting stevedores or steamship lines performing stevedoring operations or contracting for stevedoring work for non-members, before commencing work ascertain from the vessel owner, operator, or agent, whether or not such owner, operator or agent will accept responsibility for the tonnage tax;

3. That all member contracting stevedores and steamship lines accept the responsibility for billing the tonnage assessment on all tonnage handled by them for non-member vessels, their owners, operators or agents;

4. That in the event of failure to get an acceptance of responsibility for the payment of the tonnage tax from the non-member vessel operator, a man-hour assessment of 4 cents per man-hour be authorized, collection of which will be the responsibility of the member contracting stevedore or steamship lines, and that all member contracts for stevedoring such non-member vessels shall provide for the levy and collection of the same;

5. The above recommendation (Item No. 4) is predicated upon the understanding that the Waterfront Employers Association of the Pacific Coast will proceed at once to reach an agreement with the District Officials of the I. L. & W. U., that where owners or operators of non-member vessels do not agree to promptly pay tonnage or man-hour assessments, no men will be furnished by the I. L.

& W. U. or any of its Locals for stevedoring work on such vessels, and that in event such agreement cannot be reached the matter shall be promptly brought to arbitration for final settlement.

Submitted by the

STEVEDORING COMMITTEE.

Approved and adopted by formal resolution of the Board of Directors February 15, 1940, and effective at once.

A. BOYD,

Secretary. [174]

DEFENDANT'S EXHIBIT E

Admitted Mar. 27, 1945.

February 15, 1940

Non-Member Assessments

Stevedore Committee presented its report on collection of non-member assessments.

Resolution Adopted:

Be It Resolved, That the Report by the Stevedoring Committee on reporting and levying of non-member tonnage and collection of assessments and man-hour charges be adopted on a coastwise basis.

DEFENDANT'S EXHIBIT F

Admitted Mar. 27, 1945.

(Excerpt from Minutes)

Joint Meeting of Board of Directors of the Waterfront Employers Association of the Pacific Coast and Waterfront Employers Association of San Francisco.

January 12, 1943

2:30 p.m.

“Mr. Foisie discussed briefly the unsettled condition in the Northwest over non-payment of assessments by some of the Stevedores in the Puget Sound area and indicated that from available information Griffiths & Sprague was nearly the only company in Seattle which is not reporting and paying the Association's tonnage assessments on cargo handled, although there were a few minor similar conditions in the Grays Harbor and some of the Puget Sound outports that would have to be worked out after the Griffiths & Sprague issue is settled. He indicated that time was running in connection with this controversy and that the obligation was rapidly mounting as far as Griffiths & Sprague were concerned and that some drastic action appeared to be necessary.

“Mr. Harrison suggested, that either orally or in writing, the Army Transport Service in Seattle for whom Griffiths & Sprague were doing most of their work be advised that this company was using the services of the Association and were not paying for them, while other companies in Seattle with

facilities to handle this business had equipment and services that were not being used, and request the Army's attitude in connection with the matter.

"After discussion, upon motion of Mr. Gallagher, seconded by Mr. Busch, the following resolution was unanimously adopted:

"Be It Resolved, That it be the recommendation of this Board that Mr. Foisie, president of the Association, go to Seattle as soon as possible and discuss the non-payment of Association assessments with Griffiths & Sprague and also discuss with the Army Transport Service authorities in Seattle the whole situation as outlined in Mr. Harrison's suggestion today, and

"Be It Further Resolved, That Mr. Foisie be given full authority to act by this Board." [176]

DEFENDANT'S EXHIBIT G

offered and ruling reserved Mar. 27, 1945.

March 12, 1943

To Special San Francisco Committee:

J. A. Lunny, W. P. Sexton, W. J. Bush, Thomas James.

Gentlemen:

The tonnage assessment of $2\frac{1}{2}c$ per ton is intended to provide income to cover the operations

of the Waterfront Employers Association of the Pacific Coast. At the present time this tonnage assessment is paid by those companies doing stevedoring work.

In California ports the entire stevedoring operation consists of moving cargo to and from first place of rest to ship's hold.

In Puget Sound this work is divided into two operations; one, handling cargo to and from first place of rest to ship's tackle; the other, to and from ship's tackle to ship's hold.

In addition, many men are secured from the hiring hall for the purpose of loading and unloading cars, piling cargo on lift boards, stacking same, and other work on the docks preparatory to the actual loading of ships.

We propose to collect on a man-hour basis for all men secured from the hall for any of the work described above. The sum of such collection to make up a total assessment of 21½c per ton for all cargo handled to and from ships in this district.

We request that the Coast Association recognize these facts and instruct the Washington Association to so collect from all employers, using men as heretofore described, in an equitable manner, and remit the proceeds to the Coast Association on a basis of 21½c per ton for all cargo handled to and from ships as already mentioned.

We would like the Coast Association to pass a

resolution instructing the Washington district to act accordingly.

Special Committee representing Employers of Washington appointed by Mr. Middleton.

R. C. CLAPP

S. STOCKING

WILLIAM SEMAR

F. E. SETTERSTEN [177]

DEFENDANT'S EXHIBIT H

offered and ruling reserved Mar. 27, 1945.

March 12, 1943

To Special San Francisco Committee — J. A. Lunny, W. P. Sexton, W. J. Bush, Thomas James.

Gentlemen:

The Washington employers believe that the expense of mainting the Coast Association should be borne by all those interested and receiving its benefits.

Presently this expense is borne entirely by those performing the stevedoring services.

We believe the ships should bear a share of this expense.

We propose that the Coast Association recognize that a tonnage tax against all cargo handled in and out of Pacific U. S. Ports is a standard port charge,

like pilotage, custom fees, fumigation, etc., and endeavor to arrange owners and agents using Pacific Coast Ports to agree and to establish this understanding as a fact.

This tax presently to be established at 1c per ton weight for all cargo loaded or discharged at any port and to be paid to the Coast Association by the agents or owners and the agents to be responsible for its collection.

If, due to war conditions, the exact weight cannot be ascertained, the agent shall assess against the vessel and pay to the association on the basis of tons handled from arrival draft and sailing draft of the vessel.

It should be understood that after this is in operation for a short period and all stevedoring tonnage taxes are being reported and paid, and the treasurer can compute the income of the Association in relation to its expenses that the stevedoring tonnage tax will be reduced in the amount that is justifiable.

Special Committee representing Employers of Washington appointed by Mr. Middleton.

R. C. CLAPP

S. STOCKING

WILLIAM SEMAR

F. F. SETTERSTEN [178]

DEFENDANT'S EXHIBIT I.

Offered and Ruling Reserved Mar. 27, 1945.

Phone Exbrook 3913

Waterfront Employers Association
of the Pacific Coast
Financial Center Building
405 Montgomery Street
San Francisco, Cal.

March 25, 1943

Messrs. R. C. Clapp, S. Stocking, William Semar,
F. E. Settersten.

Gentlemen:

The undersigned have studied thoroughly your proposals of March 12th on assessments and submit our results for your further consideration and reply.

A meeting of the Coast Board will then be held and your entire committee will be invited and urged to attend to represent your Washington Association, especially the stevedore and terminal members; the expenses of your committee to be borne by the Coast Association.

These recommendations for your consideration:

Split Contracts:

Your all important proposal is that your members should be kept on a parity with the Coast. You are on such party except in the effect of the practice of split contracts at shipside on tonnage assessment. This committee is in full accord with your

committee that the dock stevedore or terminal operator who handles cargo between place of rest and shipside shall hereafter share with the ship stevedore in the $2\frac{1}{2}c$ per ton Coast Assessment. This would put your combined stevedore operation on a par with the practice of a single stevedore operation, hold to place of rest, which exists throughout the rest of the Coast (with the possible exception of some few operations in Portland). The division of assessment between stevedore and dock operator [179] should be proportionate to the two interests as you may locally work out, but our suggestion would be a standard split of $1\frac{1}{2}c$ from the ship stevedore, $1c$ from the dock stevedore or terminal company (including the public port authority where it handles cargo to shipside).

To carry out this sharing of the expense, the committee recommends that the ship's stevedore continue to pay his full assessment rate of $2\frac{1}{2}c$ per ton; and that arrangements be made for the dock operator to pay to the Association $1c$ per ton on all cargo which he handles in the split operation. The funds so received from the dock operators shall be paid, as and when received by the Association, to the ship's stevedore concerned in the particular operation upon which the payment is made. This arrangement should apply to Army, Navy and War Shipping Administration operations whenever the operations are split.

Cargo Carries the Assessment:

This committee shares with you the belief that

all who benefit should pay proportionately. But the basis of tonnage assessment is that the cargo carries the cost of Association services just as it carries all other costs of cargo-handling.

In the interest of keeping the assessment policy simple, it has been the uniform Coast practice from the beginning of the Association not to collect a tax from members for earloading, checker work or any other port labor operation. It seems undesirable to change that practice for the duration; but reconsideration will be given at the Coast meeting when you are present. [180]

Assessment Against Ship's Agent:

The undersigned committee believes, with the Coast Board, that a tax such as you propose be assessed against the ship's agent or shipowner is unwise. Primarily because it will be difficult if not impossible to collect such tax from the several Government departments who have contracts with our members.

Non-Members Always Assessed:

Non-member employers who get men from the dispatching hall pay a 3c per man-hour fee. We understand that you propose no change in this policy nor do we. But the public port terminals should be approached on their split-contract share.

Men from the hall for other than waterfront cargo-handling:

There are some few instances where men are supplied to member companies for work handling cargo in warehouses away from the water-

front. The Coast Board has underway a program for conserving our registered men for waterfront work rather than assessing a charge.

Enclosed is an outline which may serve to clarify the foregoing.

As soon after receipt of your comment on this letter as it is practicable, we shall be convening a Coast Board meeting with yourselves present for the purpose of completing our understanding.

Yours very truly,

W. J. BUSH

T. C. GREENE

THOMAS JAMES

JOSEPH A. LUNNY

W. T. SEXTON

Enclosure:

dh [181]

March 25, 1943

TYPES OF STEVEDORE OPERATIONS IN WASHINGTON PORTS

	Tonnage Assessment
Between hold and place of rest—one operation (Standard price on the Coast).....	2½c
Between barge (or from water) and hold (Lumber pays the Association assessment on a M ft. basis, but collects on a 600 ft. basis).....	2½c
Between ship and car alongside.....	2½c
Bulk cargo trimming gang—no dock men from hall	½c

Tonnage
Assessment

Ship gang of 10-12 men working against
gang of 4-6 men; or against lift truck
driver handling loads already built

Stevedore 11½c

Dock 1c

Note: Where there is no handling on dock (except alongside of ship by sling men) the ship stevedore pays 21½c per ton. Where cargo is handled on the dock, the dock stevedore or operator pays the stevedore 1c of the 21½c through the Association.

Stevedore pays the 21½c at all industrial docks.
Exhibit "C." [182]

DEFENDANT'S EXHIBIT J

Offered and Ruling Reserved Mar. 27, 1945.

April 19, 1943

Messrs. W. J. Bush, Thomas James, T. C. Greene,
Joseph Lunny, W. T. Sexton.

Gentlemen:

Responding to your letter of March 25, 1943.

We have been instructed by our membership that we cannot accept anything other than our proposal to you of March 12, without first submitting it to them for their approval. Therefore, we believe that your committee and our committee, should have a closer meeting of the mind before the meeting is

set up in San Francisco, which we understand we will be invited to attend.

With reference to your paragraph regarding "split contracts," we are not interested in being "kept on a parity with the Coast." We accept your statement that the Coast needs a sum of money equal to $2\frac{1}{2}c$ per ton for all cargo loaded or discharged on the Coast to pay the operating expenses of the Coast Association.

We are willing to cooperate in the collection of this sum of money, but we wish the manner of collection changed in this district. We wish the Coast Association to instruct the Washington Association to pay to Cosat Association the prevailing tonnage assessment on all cargo loaded or discharged in this district and to collect this revenue from all parties benefiting from the Association and authorizing our Washington Association to collect it in the manner our membership decides is equitable.

Referring to your paragraph "Cargo carries the assessment," we realize that this was a suitable basis when the ships carrying the freight paid the assessment. We feel that present conditions have materially changed and the method of collection should be made to suit such changed conditions. We note with interest that you agree with us "that all who benefit should pay proportionately." Surely you do not contend, as we infer from your letter, that the vessels, ship owners and ship operators and those people checking cargo and unloading cargo,

do not benefit by the fine work of the various Labor Relations Committees which the Coast Association manages.

The stevedoring companies in this district do not wish to act as collecting agents; rather, they want to be responsible only for their share of the 2½c. Our committee wishes to allocate the distribution [183] of the 2½c per ton on a man-hour basis, and yet you object to it merely on the ground that it never has been done that way. We cannot understand why the Coast Association should function free of charge for those firms who check cargo and unload cargo from cars to dock, and have those firms that load cargo to and from ships pay the way for them.

Referring to your paragraph "Assessment against ships' agent," we note that you believe it is unwise to assess the agent and/or owners. We believe that it is manifestly unfair not to do so. The only reason you offer is that it would be "Difficult, if not impossible, to collect such tax from the several Government departments who have contracts with our members."

The stevedores in this district do not collect the 2½c tax from the Army and Navy. It comes out of our own pockets.

We suggested a tonnage tax against the vessels. If this is not workable then why not set up membership dues and/or a flat fee per ship-sailing.

We suggest and request that the ship owners,

agents and operators, who organized, who manage, and who have continued this fine Association to contribute a justifiable amount of this 21½¢ per ton in any manner they see fit and in any amount they deem fair.

Special Committee Waterfront Employers of Washington Appointed by K. J. Middleton:

Messrs. R. C. Clapp, Chairman, Sam Stocking, Wm. Semar, F. E. Settersten.

Exhibit 2.

DEFENDANT'S EXHIBIT K

Offered and Ruling Reserved Mar. 27, 1945.

WATERFRONT EMPLOYERS ASSOCIATION OF THE PACIFIC COAST

Financial Center Building
405 Montgomery Street
San Francisco, Calif.

May 14, 1943

Messrs. R. C. Clapp, Chairman, Sam Stocking, William Semar, F. E. Settersten, Special Committee Waterfront Employers of Washington.

Gentlemen:

The Director of the Coast Association recommend the following for your consideration to meet the proposals set forth in your letter of April 19th:

All members in your Association who are direct employers of labor on the dock will pay into your

Port Association treasury a man-hour assessment, the amount of which is to be worked out on a basis that provides for the dock work paying its fair share of the Association expense;

All members in your Association who are direct employers of longshore labor will continue to pay the Coast assessment of 2½¢ per ton covering cargo handled between sling and hold;

Assessments collected on a man-hour basis will at intervals be returned by the Port Association treasury to members paying sling to hold tonnage handled and these returns should effect a substantial reduction in the sling to hold assessment;

In the case of a vessel still under commercial operation, the Coast assessment will continue to be paid by the cargo.

It is believed such program meets your two-fold objective of reducing the tonnage assessment to your stevedore members and to eliminate the free ride for some of your members. [185]

The Directors of the Coast Association tender their support to your local Association in working out and effecting such program.

A full Coast Board meeting is called for May 27th. Your Committee is urged to attend in full. In addition, it will be appreciated if you will invite the small Port stevedores in your district to be represented by someone of their selection.

It is requested that your Committee meet the undersigned San Francisco Committee on the day

before the Coast meeting, May 26th at 10:00 a.m. for the purpose of effecting a mutually satisfactory understanding on the basis of which there can be a joint recommendation to the representatives from all ports and to the Coast Board of Directors.

Yours very truly,

Committee on Relations with Seattle

W. J. BUSH

T. C. GREENE

THOMAS JAMES

J. A. LUNNY

W. T. SEXTON."

Exhibit 3

DEFENDANT'S EXHIBIT L

Admitted May 17, 1945.

Resolution Adopted by Board of Directors of
Waterfront Employers Association of the Pa-
cific Coast on November 10, 1943.

"Be it resolved, That it be the recommendation of this Board that a study be made of the advisability of requesting the Washington Association to remove from its membership those companies who are delinquent in paying tonnage assessments to the Coast Association and should such expulsion be accomplished and the Association be compelled to furnish men through the hiring hall to such delinquent members, that a man-hour charge be levied in lieu of a tonnage assessment on the same basis as non-members using men out of the hiring hall; that after such study has been made, that a report be made back to this Board." [187]

DEFENDANT'S EXHIBIT M

Admitted May 17, 1945.

Copy of Resolution Adopted November 24, 1942,
by the Board of Trustees of Waterfront Employers of Washington

Resolution Adopted: That we agree with the Coast Board that all delinquencies should be paid.

Resolution Adopted: Moved and seconded that all delinquencies by stevedores be paid up to January 1, 1942.

Resolution Adopted: It is hereby moved that this Board recommend to the stevedores and those handling cargoes over docks and to and from cars, that they endeavor to work out a plan for payment on a man hour basis of all men ordered from longshore and checker halls that will be equivalent to two and one-half cents per ton on all cargo moved by water in this port. This to be retroactive to January 1, 1942. [188]

DEFENDANT'S EXHIBIT M-1

Admitted May 17, 1945.

Minutes of Meeting of Board of Trustees
Waterfront Employers of Washington

10:45 a. m.—November 24, 1942

Present: F. E. Settersten, M. J. Webber.

Tonnage Assessments—Chairman reviewed proceedings of the Coast Board meeting on November

11 and 12. Minutes of those meetings were distributed to the members.

The following resolutions were adopted:

1. That we agree with the Coast Board that all delinquencies should be paid.

2. That all delinquencies by stevedores be paid up to January 1, 1942.

3. This Board recommends to the stevedores and those handling cargoes over docks to and from cars, that they endeavor to work out a plan for payment on a man-hour basis of all men ordered from longshore and checker halls that will be equivalent to two and one-half cents per ton on all cargo moved by water in this district. This to be retroactive to January 1, 1942.

4. It is strongly recommended and urged that the Coast Board consider approaching member companies to effect a method by which those member shall contribute to the support of the Coast Association. It is believed that member companies are jointly concerned with stevedoring companies and dock operators in perpetuating the Coast Association and, in equity, should bear a reasonable share of the expense. [189]

DEFENDANT'S EXHIBIT N

Admitted May 17, 1945.

Waterfront Employers of Washington

Alaska Building

Seattle, Washington

Main 8448

December 11, 1942

Messrs. R. C. Clapp, F. E. Settersten, R. A. Armstrong.

Gentlemen:

At the stevedores' meeting on Nov. 24, 1942, the following resolutions were moved and seconded:

1. Be It Resolved, by the members of the Association of Washington Stevedores, and stevedores of the Northwest, in meeting assembled, that they endorse the action taken by the Board of Trustees of the Waterfront Employers of Washington on Nov. 24, 1942, with reference to Coast Association tonnage assessments as set forth hereunder, with the stipulation that we do not acknowledge any liability as per Memorandum Agreement dated May 9, 1940, between the various Waterfront Employers Associations and the various stevedoring members for the payment of tonnage tax of non-member vessels, which include vessels operated by the Army, Navy and other Government agencies.

2. Be It Resolved, that the president of Waterfront Employers of Washington appoint a committee of stevedore members of the Waterfront Employers of Washington to confer with the dock

operators to work out a plan to submit to the Waterfront Employers of Washington to effect the purpose of the foregoing resolution.

Following the instructions contained in the second resolution I am asking you to serve as that committee.

Mr. W. F. Varnell will be glad to arrange a meeting with a committee representing the dock operators.

May I remind you of the position at present:

1. The Trustees of the Waterfront Employers of Washington passed a resolution: "That we agree with the Coast Board that all delinquencies should be paid."

2. The stevedores have endorsed the position of the local Board of Trustees.

3. The position of the Coast Board is that stevedores are liable for the payment of the 2½c tonnage assessment. The Coast Board also adopted a recommendation that the Northern district members forward their recommendations on dividing tonnage assessments between dock operators and stevedores where possible. [190]

As to the stevedores obtaining relief from those doing the work on the dock.

1. The stevedores agree to pay to Jan. 1, 1942 without relief.

2. As from Jan. 1, 1942 onward, the effort of your committee will be to secure agreement with

dock operators and stevedore companies doing work on the docks for an equitable contribution to the 21½c ton assessment.

It is hoped in the interests of all concerned that you will succeed in finding a satisfactory formula to reach agreement for dividing the amount of the assessment between ship and dock work.

Regarding the future the local Board of Trustees passed a resolution reading:

“It is strongly recommended and urged that the Coast Board consider approaching member companies to effect a method by which those members shall contribute to the support of the Coast Association. It is believed that member companies are jointly concerned with stevedoring companies and dock operators in perpetuating the Coast Association and, in equity, should bear a reasonable share of the expenses.”

It is hoped that some such arrangement can be made but until the situation is cleared by payment of tonnage assessments to date, it seems unlikely that the Coast Board will act.

In these busy times it may assist, if you so desire, to be represented by an alternate from your respective firms.

Yours very truly,

K. J. MIDDLETON

KJM:k [191]

DEFENDANT'S EXHIBIT O

Admitted May 17, 1945.

Employer

Port..... Date.....194.....

Ship..... Dock.....

This is to advise you that on the tonnage handled by us for the U. S. Army up until Jan. 31st, 1943, upon which U. S. tonnage assessment has been paid, we will pay the Wa.F.E. of the Pac. Coast the tonnage assessment of $2\frac{1}{2}c$ per ton on a volume of tonnage to be determined. Payment to be made in approximately equal installments of thirty, sixty and ninety days from this date.

Also from Feb. 1st, 1943, onward, we will pay the tonnage assessments currently at the rate set by the Coast Assn.

Signed.....

DEFENDANT'S EXHIBIT P

Rejected May 17, 1945.

Seattle, Washington

Circular No. 1200

December 3, 1937

To the Members of the

Waterfront Employers of Seattle

Gentlemen:

For your ready reference we review below rates for tonnage and payroll assessments, and instructions relative to reporting:

The rates of assessments are as follows:

Off-shore and Intercoastal Cargo

General Cargo2c per manifest ton

Lumber2c per M. ft.

Bulk Cargo Dry4/10c per ton

(Bulk fluid cargo exempt)

Trans-shipped Cargo $\frac{1}{2}$ rate of foregoing
(each vessel)

Coastwise Cargo

$\frac{1}{2}$ off-shore rates paid in and out. When handled by crew and longshoremen, tonnage to be taxed is to be calculated proportionate to man hours of longshoremen and crew actually handling cargo.

Operators who are not members of either individual port associations or the Coast Association:

2 $\frac{1}{2}$ c per man per hour (or at rates noted above)

Payroll Assessments

The payroll assessment will be three-fourths ($\frac{3}{4}$) of one per cent. (Payrolls equal total hours worked multiplied by straight time rates). This applies to stevedores, dock companies, steamship company performing their own services and all other services securing men from the Longshore Joint Dispatching Hall.

Fluid Bulk Cargo

All fluid bulk cargo is exempt from assessment, regardless of trade or route. But this tonnage should be shown on the Monthly Report for statistical purposes.

How they are to be reported and paid

All payroll assessments in this district are to be paid to the local treasurer. Tonnage assessments from all members, who have indicated their intention of reporting through the local office, are to be paid to the local treasurer. [193]

These should be accompanied by monthly current report on blanks furnished, which should reach this office in sufficient time to enable us to forward them to San Francisco by the 20th of the month following the month the report covers.

Our members who are reporting direct to San Francisco are requested to have their reports reach that office by the 20th of each month for the previous month.

Handling Charge Defense Fund

This assessment is one that is being collected by the Coast Association, at the request of the joint conferences. It is a levy of 1c per ton on all off-shore and intercoastal cargo, and ordinary dry bulk. Lumber, logs, bulk grain, bulk oil, and all coastwise cargo and cargo to British Columbia, Alaska and Hawaii is exempt.

A proper classification and distribution of tonnage on the "Monthly Report of Tonnage" form will take care of this.

Non-Member Lines or Steamers

Procedure for handling non-member assessments:

The member stevedores in the several ports are requested by the Coast Association to accept re-

sponsibility for the collection of the tonnage and defense fund assessment for non-member steamship lines, tramps, etc.

Non-member companies may either pay on a $2\frac{1}{2}$ c per ton man-hour basis or on the same basis as member companies. In either event, they are expected to pay 1c Coast Defense Fund.

The stevedores are not required to report tonnage of member lines.

Yours very truly,

W. C. DAWSON,

Treasurer. [194]

DEFENDANT'S EXHIBIT Q

Rejected May 17, 1945.

Waterfront Employers of Seattle

1301 Alaska Building

Seattle

Circular No. 1201.

June 18, 1938

To the members of the

Waterfront Employers of Seattle

Gentlemen:

Effective June 1, 1938 the rates of assessment on cargo will be as follows:

Off-shore and Intercoastal Cargo

General Cargo $2\frac{1}{2}$ c per manifest ton

Lumber $2\frac{1}{2}$ per M. ft.

Bulk Cargo Dry5/10c per ton

(Bulk fluid cargo exempt)

Trans-shipped Cargo $\frac{1}{2}$ rate of foregoing
(each vessel)

Coastwise Cargo

½ off-shore rates paid in and out. When handled by crew and longshoremen, tonnage to be taxed is to be calculated proportionate to man hours of longshoremen and crew actually handling cargo.

Operators who are not members of either individual port associations or the Coast Association:

3c per man per hour (or at rates as noted above)

Payroll Assessments

Effective July 1, 1938, the payroll assessment will be one (1) percent, with a minimum of \$5.00 per month and covers longshore, dock and checker payrolls. (Payrolls equal total hours worked multiplied by straight time rates). This applies to stevedores, dock companies, steamship companies performing their own services and all other services securing men from the Longshore Joint Dispatching Hall.

Fluid Bulk Cargo

All fluid bulk cargo is exempt from assessment, regardless of trade or route. But this tonnage should be shown on the Monthly Report for Statistical purposes. [195]

How they are to be reported and paid

All payroll assessments in this district are to be paid to the local treasurer. Tonnage assessments from all members, who have indicated their intention of reporting through the local office, are to be paid to the local treasurer, and should be accompanied by tonnage report blanks furnished, which

should reach this office in sufficient time to enable us to forward them to San Francisco by the 20th of the month following the month the report covers.

Our members who are reporting direct to San Francisco are requested to have their reports reach that office by the 20th of each month for the previous month.

Handling Charge Defense Fund

This assessment is one that is being collected by the Coast Association, at the request of the joint conference. It is a levy of 1c per ton on all off-shore and intercoastal cargo, and ordinary dry bulk. Lumber, logs, bulk grain, bulk oil, and all coastwise cargo and cargo to British Columbia, Alaska and Hawaii is exempt.

A proper classification and distribution of tonnage on the "Monthly Report of Tonnage" form should be made to conform to the above.

Non-Member Lines or Steamers

Procedure for handling non-member assessments:

The member stevedores in the several ports are requested by the Coast Association to accept responsibility for the collection of the tonnage and defense fund assessment from non-member steamship lines, tramp, etc.

Non-member companies may either pay a 3c per man-hour basis or on the same basis as member companies. In either event, they are expected to pay 1c Coast Defense Fund.

The stevedores are not required to report tonnage of member lines.

Yours very truly,
W. C. DAWSON,
Treasurer. [196]

DEFENDANT'S EXHIBIT R

Rejected May 17, 1945.

Waterfront Employers of Seattle
1301 Alaska Building
Seattle

July 27, 1939

Circular No. 1202.

To the Members of the Waterfront
Employers of Seattle

Gentlemen:

Effective June 1, 1938 the following rates of assessment on cargo became effective:

Off-shore, Intercoastal and Alaska Cargo:

General Cargo2½c per manifest ton

Lumber2½ per M. ft.

Bulk Cargo Dry5/10c per ton

(Bulk Fluid Cargo exempt)

Trans-shipped Cargo½ rate of foregoing
(each vessel)

Coastwise Cargo:

½ off-shore rates paid in and out. When handled by crew and longshoremen, tonnage to be taxed is to be calculated proportionate to man hours of longshoremen and crew actually handling cargo.

Fluid Bulk Cargo:

All fluid bulk cargo is exempt from assessment, regardless of trade or route. But this tonnage should be shown on the Monthly Report for statistical purposes.

Operators who are not members of either individual port associations or the Coast Association:

3c per man per hour (or at rates as noted above).

Payroll Assessments:

Effective July 1, 1938, the payroll assessment was fixed at one (1) percent, with a minimum of \$5.00 per month and covers longshore, dock and checker payrolls. (Payrolls equal total hours worked multiplied by straight time rates). This applies to stevedores, dock companies, steamship companies performing their own services and all other services securing men from the Longshore Joint Dispatching Hall. [197]

How they are to be reported and paid:

All payroll assessments in this district are to be paid to the local treasurer. Tonnage assessments from all members, who have indicated their intention of reporting through the local office, are to be paid to the local treasurer, and should be accompanied by tonnage report blanks furnished which should reach this office in sufficient time to enable us to forward them to San Francisco by the 20th of the month following the month the report covers.

Our members who are reporting direct to San Francisco are requested to have their reports reach

that office by the 20th of each month for the previous month.

Non-Member lines or Steamers:

Procedure for handling non-member assessments:

The member stevedores in the several ports are requested by the Coast Association to accept responsibility for the collection of the tonnage and defense fund assessment for non-member steamship lines, tramps, etc.

Non-member companies may either pay on a 3c per man-hour basis or on the same basis as member companies. In either event, they are expected to pay 1c Coast Defense Fund, as not on page 3.

The stevedores are not required to report tonnage of member lines.

Handling Charge Defense Fund:

This assessment is one that is being collected by the Coast Association, at the request of the Joint Conference. Since May 1, 1939, and at the present time, the Handling Charge Defense Fund assessment is 1c per ton on all off-shore cargo and ordinary dry bulk.

All coastwise cargo and cargo to British Columbia, Alaska and Hawaii is exempt.

The following commodities are also exempt when loaded from or discharged into cars, bunkers, or other shore facility, direct by ship's tackle or mechanical device:

Concentrates	Fluorspar
Grain	Gravel
Lumber	Gypsum
Logs	Linseed
Bulk Oil—(Animal)	Magnesite
(Fish)	Nitrate Soda
(Petroleum)	Phosphate Rock
(Vegetable)	Phosphate Acid Am-
Ore	monium
Piling	Potash
Scrap Iron	Salt
Scrap Steel	Salt Cake
Bones	Sand
Chalk	Silica
Clay	Soda Ash
Coal	Stone, Crushed
Coke	Sulphur & Vermiculite
Copra	

A proper classification and distribution of tonnage on the "Monthly Report of Tonnage" form should be made to conform to the above.

Note: This circular consolidates all former rate assessment circulars.

Your very truly,

WATERFRONT EMPLOYERS
OF SEATTLE,

W. C. DAWSON,

Treasurer. [199]

DEFENDANT'S EXHIBIT S

Rejected May 17, 1945.

Waterfront Employers of Washington
 1301 Alaska Building
 Seattle

February 26, 1940

Circular No. 1203

To the Members of the

Waterfront Employers of Washington

Effective February 1, 1940 the following rates
 of assessment on cargo became effective:

Off-shore, Intercoastal and Alaska Cargo:

General Cargo.....2½c per manifest ton

Lumber2½c per M. ft

Bulk Cargo Dry5/10c per ton

(Bulk Fluid Cargo exempt)

Trans-shipped Cargo½ rate of foregoing
 (each vessel)

Coastwise Cargo:

½ off-shore rates paid in and out. When handled
 by crew and longshoremen, tonnage to be taxed is
 to be calculated proportionate to man hours of
 longshoremen and crew actually handling cargo.

When ocean revenue is based on weight, 2000#
 equals 1 ton.

When ocean revenue is based on measurement,
 40 cu. ft. equals 1 ton.

Fluid Cargo:

All fluid bulk cargo is exempt from assessment,
 regardless of trade or route. But this tonnage

should be shown on the Monthly Report for statistical purposes.

Payroll Assessments:

The payroll Assessment is one (1) percent, with a minimum of \$5.00 per month and covers long-shore, dock and checker payrolls. (Payrolls equal total hours worked multiplied by straight time rates.) This applies to stevedores, dock companies, steamship companies performing their own services and all other services securing men from the Joint Dispatching Halls. [200]

How they are to be reported and paid:

All payroll assessments in this district are to be paid to local treasurer.

Tonnage assessments from all members, who are reporting through the local office, are to be paid to the local treasurer, and should be accompanied by tonnage report blanks furnished which should reach this office in sufficient time to enable us to forward them to San Francisco by the 20th of the month following the month the report covers.

Our members who are reporting direct to San Francisco are requested to have their reports reach that office by the 20th of each month for the previous month.

Non-members of either port associations or the Coast Association:

Effective February 15, 1940.

At the meeting of the Coast Board of Directors in San Francisco on February 15, last, it was the

recommendation of the Stevedore Committee that the member contracting stevedore or steamship lines performing stevedore operations, or contracting for stevedoring work for non-members, assume the responsibility for collecting the tonnage assessment from non-members on the basis as heretofore noted.

That in the event of failure to get an acceptance of responsibility for the payment of the tonnage tax from the non-member vessel operator, a man hour assessment of 4c per hour be authorized, collection of which will be the responsibility of the member contracting stevedore or steamship lines, and that all member contracts for stevedoring such non-member vessels shall provide for the levy and collection of the same.

It is the further responsibility of the stevedoring company to procure from non-members statement of tonnage loaded or discharged for them and report these figures separately by steamer to the local treasurer.

The stevedores are not required to report tonnage of member lines.

W. C. DAWSON,

Treasurer. [201]

DEFENDANT'S EXHIBIT T

Rejected May 17, 1945.

Waterfront Employers of Washington
1301 Alaska Building
Seattle

October 1, 1940

Circular No. 1204

(Superseding all previous assessment circulars)

Assessment Rates

Off-shore, Intercoastal and Alaska Cargo:

General Cargo2½c per ton

Lumber2½c per M. ft.

Bulk Cargo, Dry5/10c per ton

Bulk Cargo, FluidExempt

Trans-shipped Cargo½ rate of foregoing
(each vessel)

Coastwise Cargo:

½ off-shore rates paid in and out. When handled by crew and longshoremen, tonnage to be taxed is to be calculated proportionate to man-hours of longshoremen and crew actually handling cargo.

Fluid Bulk Cargo:

All fluid bulk cargo is exempt from assessment, regardless of trade or route. But this tonnage should be shown on the Monthly Report for statistical purposes.

Method of computing the Ton:

When ocean revenue is based on weight, 2000# equals 1 ton.

When ocean revenue is based on measurement, 40 cu. ft. equal 1 ton.

How Assessments are to be reported and paid:

Tonnage assessments from members, who are reporting through the local office are to be paid to the local treasurer, and should be accompanied by tonnage report blanks furnished, which should reach this office in sufficient time to enable us to forward them to San Francisco by the 20th of the month following the month the report covers. [202]

Our members, who are reporting direct to San Francisco, are requested to have their reports reach that office by the 20th of each month for the previous month.

Non-Members of either Port Associations or the Coast Association:

It is the responsibility of member contracting stevedores or steamship lines doing contract stevedoring, to collect tonnage assessments from non-member operators on a tonnage basis only, at rates noted in this bulletin.

It is the further responsibility of the stevedoring company to procure from non-members statement of tonnage loaded and discharged for them and report to the local treasurer on Monthly Tonnage Report Forms furnished; each steamer separately.

The stevedores are not required to report tonnage of member lines.

Payroll Assessments:

Longshore, dock and checker	1%
Minimum	\$5.00

Payrolls equal total hours worked multiplied by straight time rates.

This assessment applies to stevedores, dock companies and steamship companies performing their own services, and all other services securing men from the Joint Dispatching Halls.

How they are to be reported and paid:

All payroll assessments in this district are to be paid to the local treasurer.

W. C. DAWSON,
Treasurer. [203]

DEFENDANT'S EXHIBIT U

Rejected May 17, 1945.

Waterfront Employers of Washington
1301 Alaska Building
Seattle

January 7, 1941

Circular No. 1205—Effective January 1, 1941

(Superseding all previous Assessment circulars)

Assessment Rates

Off-shore, Intercoastal and Alaska Cargo:

General Cargo	2½c per ton
Lumber	2½c per M. ft.

Bulk Cargo, Dry	5/10c per ton
Bulk Cargo, Fluid	Exempt
Trans-shipped Cargo	1/2 rate of foregoing (each vessel)

Coastwise Cargo:

1/2 off-shore rates paid in and out. When handled by crew and longshoremen, tonnage to be taxed is to be calculated proportionate to man-hours of longshoremen and crew actually handling cargo.

Fluid Bulk Cargo:

All fluid bulk cargo is exempt from assessment, regardless of trade or route. But this tonnage should be shown on the Monthly Report for statistical purposes.

Method of computing the Ton:

When ocean revenue is based on weight, 2000# equal 1 ton.

When ocean revenue is based on measurement, 40 cu. ft. equal 1 ton.

How Assessments are to be reported and paid:

Tonnage assessments from members, who are reporting through the local office, are to be paid to the local treasurer, and should be accompanied by tonnage report blanks furnished, which should reach this office in sufficient time to enable us to forward them to San Francisco by the 20th of the month the report covers. [204]

Our members, who are reporting direct to San Francisco, are requested to have their reports reach that office by the 20th of each month for the previous month.

Non-Members of either Port Associations or the Coast Association:

It is the responsibility of member contracting stevedores or steamship lines doing contract stevedoring, to collect tonnage assessments from non-member vessel operators on a tonnage basis only, at rates noted in this bulletin.

It is the further responsibility of the stevedoring company to procure from non-members statement of tonnage loaded or discharged for them and report to the local treasurer on Monthly Tonnage Report Forms furnished; each steamer separately.

The stevedores are not required to report tonnage of member lines.

Payroll Assessment: (Authorized by the Board of Trustees January 6, 1941)

Total payrolls (Longshore, dock	
and checker	3/4%
Minimum	\$5.00

This assessment applies to stevedores, dock companies and steamship companies performing their own services, and all other services securing men from the Joint Dispatching Halls.

How they are to be reported and paid:

All payroll assessments in this district are to be paid to the local treasurer.

W. C. DAWSON,

Treasurer. [205]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
ACTION IN U. S. CIRCUIT COURT OF
APPEALS

The parties having stipulated in writing,

It Is Ordered that the time for filing the record on appeal herein and for docketing the above-entitled action with the United States Circuit Court of Appeals for the 9th Circuit be and the same is hereby extended to include the period ending 90 days from the date of the first notice of appeal herein given on behalf of the defendant.

Done in Open Court this 15th day of August, 1946.

/s/ LLOYD L. BLACK,

U. S. District Judge.

Presented by:

DAVID O. HAMLIN,

Of Counsel for Defendant.

Approved as to form and notice of presentation waived:

EDWARD G. DOBRIN,

Of Counsel for Plaintiff.

[Endorsed]: Filed Aug. 15, 1946. [206]

[Title of District Court and Cause.]

STATEMENT OF POINTS

Comes now the defendant-appellant, Griffiths and Sprague Stevedoring Company, Incorporated, and states the following as the points upon which it intends to rely in the appeal taken to the Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause:

1. The defendant-appellant is not liable for the payment of dues to plaintiff-appellee at the rate of 2½ cents per ton, because all cargo upon which such dues are sought to be collected was for the account of the United States Army under contracts between defendant-appellant and the United States of America and, in consequence, the collection of such dues from defendant-appellant is contrary to public policy and void because of its tendency to add to the cost of public contracts.

2. The defendant-appellant is not liable for the payment of dues to plaintiff-appellee in any sum whatsoever because defendant-appellant is only an Associate Member of plaintiff-appellee corporation, and the Articles of [207] Incorporation and By-Laws of plaintiff-appellee do not authorize or permit levy or collection of dues from an Associate Member.

3. The defendant-appellant is not liable for the payment of dues to plaintiff-appellee in any sum whatsoever because defendant-appellant is only an Associate Member of plaintiff-appellee corporation,

and as such member can, at most, be subjected to liability for payment of dues only on a basis which applies uniformly to all Associate Members. The program of plaintiff-appellee for collection of dues from defendant-appellant does not apply uniformly to all Associate Members of plaintiff-appellee corporation and is, therefore, invalid.

4. The defendant-appellant is not liable for the payment of dues to plaintiff-appellee in any sum whatsoever because the By-Laws of plaintiff-appellee provide that its membes, by majority vote, establish a maximum rate for dues and assessments as a condition precedent to the adoption of any resolution by its Board of Directors relative to such dues or assessments, and no such maximum rate has ever been so established by a majority of such members.

5. The defendant-appellant is not liable for the payment of dues to plaintiff-appellee under any contract, express or implied in fact or law, because no such contract for payment of the dues sought to be collected in this action has at any time been in existence.

6. The defendant-appellant is not liable for the payment of any dues which plaintiff-appellee seeks to collect in this suit because plaintiff-appellee has sought to compel payment thereof by threats of economic retaliation against defendant-appellant in the event of its refusal to pay the [208] amounts demanded, and such conduct on the part of plaintiff-appellee is so contrary to public policy as to

make its claim against defendant-appellant unenforceable, and any alleged agreement of defendant-appellant with respect thereto wholly void or at least voidable at the election of defendant-appellant.

7. The defendant-appellant is not liable for the payment of any dues to plaintiff-appellee because the entire program of plaintiff-appellee seeks to collect, in the guise of dues, a so-called "tonnage tax" on all cargo entering or leaving ports on the West Coast of the United States, whether carried by or for the account of members of plaintiff-appellee, and is monopolistic in tendency and is an unlawful interference by plaintiff-appellee with interstate and foreign commerce.

/s/ McMICKEN, RUPP &
SCHWEPPE

/s/ J. GORDON GOSE

/s/ EDWARD M. HAY

/s/ DAVID O. HAMLIN

Attorneys for Defendant-
Appellant.

Copy received Aug. 22, 1946.

BOGLE, BOGLE & GATES.

[Endorsed]: Filed. Aug. 22, 1946. [209]

[Title of District Court and Cause.]

ORDER DIRECTING INCLUSION OF ORIGINAL EXHIBITS Nos. 4, 28, 35, 37, 38, 39, 40 AND 45 IN RECORD ON APPEAL

The parties having stipulated in writing and said stipulation being filed herein,

It Is Ordered That the originals of Exhibits 4, 28, 35, 37, 38, 39, 40 and 45 be included by the Clerk of this Court in the record on appeal of this cause to the Circuit Court of Appeals, 9th Circuit, in lieu of copies of said exhibits and in lieu of any portions of said exhibits heretofore designated by the parties.

Done in Open Court this 18 day of September, 1946.

LLOYD L. BLACK,

U. S. District Judge.

Presented by:

DAVID O. HAMLIN,

Of Counsel for Defendant.

Approved as to form and notice of presentation waived:

EDWARD G. DOBRIN,

Of Counsel for Plaintiff.

[Endorsed]: Filed Sept. 18, 1946. [210]

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF PORTIONS OF RECORD DESIRED ON APPEAL

Comes Now the defendant and appellant herein, Griffiths and Sprague Stevedoring Company, Incorporated, a corporation, and designates the following portions of the record to be included in the record on appeal to the United States Circuit Court of Appeals for the 9th District:

1. The transcript of testimony taken at the trial.
2. Plaintiff's complaint (No. 1).
3. Defendant's answer (No. 8).
4. Findings of Fact and Conclusions of Law (No. 41).
5. Judgment (No. 42).
6. Supersedeas Bond (No. 46).
7. Notice of Appeal (No. 47).
8. Order approving Bond (No. 50).
9. Order extending time for Filing Record and Docketing on Appeal.
10. Exhibits 1, 3A, 5 to 25 inclusive, 32, 33, 36 and the following portions of Exhibit 37:
Page 1; Sheet #2 and Sheet #5, together with the following portions of Exhibit 38:

Page 1, 2, 4 and Item J Page 5, Pages 14 through

18 inclusive; [211] together with the following portions of Exhibit 39:

Page 1; Page 2 except Paragraphs D and E; Page 5, Paragraphs P and Q; Page 13 through 20 inclusive; Page 23,

and Exhibits 41, 42, 43 and 44; together with Exhibits A, B, C, D, E, F, L, M, M1, N, O, all of the foregoing being exhibits admitted in evidence at the trial hereof, and together with Exhibits G, H, I, J, and K, being exhibits offered in evidence by defendant and upon which the Court reserved ruling, together with Exhibits P, Q, R, S, T and U, being exhibits offered by defendant and rejected by the Court.

11. Appellant's statement of points.

12. Appellant's designation of portions of record to be included upon appeal.

McMICKEN, RUPP &

SCHWEPPE,

J. GORDON GOSE,

EDWARD M. HAY,

DAVID O. HAMLIN,

Attorneys for Defendant
(Appellant).

Copy received Aug. 22, 1946.

BOGLE, BOGLE & GATES.

[Endorsed]: Filed Aug. 22, 1946. [212]

[Title of District Court and Cause.]

PLAINTIFF'S DESIGNATION OF
ADDITIONAL PORTIONS OF RECORD

Comes now the plaintiff, Waterfront Employers Association of the Pacific Coast, a corporation, and designates the following additional portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Plaintiff's Request for Admission Under Rule 36 of the Federal Rules of Civil Procedure (13).

Omit: Requests Nos. 10, 11 and 33 and all Exhibits thereto.

2. Amended Statement of Defendant with Respect to Plaintiff's Request for Admissions Under Rule 36 (22).

Omit: Paragraph IV.

3. Answer to Written Interrogatories Numbers 1 to 5 Propounded by Plaintiff (26).

Omit: All Exhibits thereto.

4. Answer to Written Interrogatories Numbers 6 to 15 Propounded by Plaintiff (20).

Omit: Interrogatories Nos. 10, 11, 12(d), 13 and 14 and answers thereto.

5. Exhibits 2, 4, 28, 30, 31, 34, 35, 45, 46.

Exhibit 37—Omit only:

Pages 1A, 1B, 1C, 1D except paragraph 14, 1F, 1G, and paragraphs 17(b), (c), (d) of page 1E.

Sheets Nos. 3 except paragraph K, 4 except paragraphs K and N. [213]

Change Orders A, B.

Supplemental Agreements, D, E, F.

Exhibit 38—Omit only:

Pages 3, 5 except paragraph J, 6 except paragraph R, 7 except paragraphs Z and AA, 8, 9 except paragraph 6, 11, 12, 13 except paragraph 13 and paragraphs 8, 9(b), (c), (d) from page 10.

Supplemental Agreement A.

Exhibit 39—Omit only:

Pages 3, 4, 6, 7, 8, 9, 10 except paragraph 6, 11, 12, paragraphs D and E from page 2, paragraphs S, T and U from page 5, paragraphs 8, 9(b) and 10 from page 11.

Supplemental Agreement B.

Exhibits 40—Omit only:

Letter September 2, 1944; letter September 11, 1944.

From Part II paragraphs 3, 4, 5(a), (b).

From Part I paragraphs 3, 4(a), (b), (d), (e), (f), (g), 5 to 19 both inclusive, 21(a), (b), (c), 22, 23(b).

6. This designation.

BOGLE, BOGLE & GATES,
EDWARD G. DOBRIN,
Attorneys for Plaintiff.

Copy received this 29 day of August, 1946.

McMICKEN, RUPP &
SCHWEPPE,
J. GORDON GOSE,
EDW. M. HAY and
DAVID O. HAMLIN,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 29, 1946. [214]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF U. S. DIS-
TRICT COURT TO TRANSCRIPT OF
RECORD ON APPEAL

United States of America,
Western District of Washington—ss

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 214, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above entitled cause as is required by designation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, together with the reporter's transcript of testimony and proceedings constitute the record on appeal herein from the judgment of said United States District Court for

the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit: [215]

Clerk's fees for making record, certificate or return:

38 Pages at 40c.....	\$15.20
178 Pages at 10c.....	17.80
(copies furnished)	
Appeal Fee	5.00
<hr/>	
Total	\$38.00

I hereby certify that the above amount has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 30 day of Sept., 1946.

[Seal]

MILLARD P. THOMAS,

Clerk.

By /s/ TRUMAN EGGER,

Chief Deputy Clerk. [216]

District Court of the United States
Western District of Washington
Northern Division

Civil Action No. 895

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST, a corporation,
Plaintiff,

vs.

GRIFFITHS and SPRAGUE STEVEDORING
COMPANY, INCORPORATED, a corpora-
tion,
Defendant.

TRANSCRIPT OF TESTIMONY

The Court: Now, we will take up the case of the Waterfront Employers' Association. Counsel, you may proceed.

Mr. Dobrin: If the Court please, I don't intend in this opening statement to make a detailed statement because it is my present plan, at least in the offering of testimony in the way of exhibits, to offer them in a chronological order so that the story in this case will unfold; and I am not going in the opening statement to go through all that process.

The Court: I have read your trial brief, and I have the benefit of that. I haven't encountered any trial brief by defendant.

Mr. Gose: I have one here, your Honor.

The Court: You have it now?

Mr. Gose: Yes.

The Court: Of course, I haven't read it yet.

Mr. Gose: Would you like to have me hand it to you at this time.

The Court: Very well. Then I can read it, maybe, this noon.

Mr. Gose: Your Honor, the first forty pages of that trial brief are really a chronological statement of the facts of the case, as we deem them to be material, setting out in chronological order for the convenience of the Court the various items which we believe will be introduced in evidence, most of which are already in this record, but in a rather jumbled form as far as chronological location is concerned. That has been prepared in that form so that you may have in sequence and under one cover those items which we think are [1*] material.

The Court: I think my statement to counsel, in the absence of any defendant's trial brief, that the problem so far was puzzling to me, is a statement that defendants must have anticipated I would make; otherwise, I would not be confronted with a 69-page trial brief supplementing a 36-page trial brief which I have just finished reading. I say that in my defense. At least, however simple the problem is to counsel on each side, they have anticipated that it would not be simple for me.

Mr. Dobrin: Well, if I may take the liberty of disagreeing with your Honor, it was for the purpose of putting everything in convenient form rather than offering something that would——

The Court: (Interposing) I appreciate very

* Page numbering appearing at foot of page of original Reporter's Transcript.

much comprehensive trial briefs, but I will let you know you don't need to apologize at the present moment. At least, without the benefit of the defendant's trial brief, I feel there is quite a problem.

Mr. Dobrin: In view of that fact that your Honor has read the trial memorandum, I think I can conserve time by merely making this statement, that, as it appears from this memorandum, the plaintiff brings this suit against one of its members to recover the tonnage assessment which is levied for the support and maintenance of the plaintiff. The testimony will show the levying of the assessment, will show the amount due under the assessment, and when we have done that, we conceive that we are entitled to judgment for the amount shown. Therefore, presumably, the case—the [2] further presentation will revolve around the asserted defense, affirmative defense of the defendant in connection with that showing.

Now, if the Court will permit, I would like to have from the original file certain original papers such as bills of particulars, admissions and interrogatories, because it is pursuant to these that I am going to commence the presentation of the testimony.

The Court: Would you like the original file?

Mr. Dobrin: Yes, your Honor.

The Court: I am giving you everything in the file except the defendant's trial brief.

Mr. Dobrin: I don't need that. And may I ask the clerk to remove the portions of it that I would

like to have removed? In the trial memorandum Mr. Gose has suggested that I might mention that—I refer to the situation that at the moment there is no material presented by the defendant as to the tonnage assessment for the period 1945. It is suggested in the trial memorandum that if that were not made available, that some disposition be made of that intervening period so that this litigation would be wholly without prejudice to the recovery of that further amount. And Mr. Gose and I are in accord that that may be so. In other words, I presume for a variety of reasons and mechanical difficulty of getting up those figures, we have the figures up to and including 1944, but not for the period of 1945 to date.

The Court: It is stipulated by both parties that the Court may consider the period up to and including December 31, 1944? [3]

Mr. Gose: Yes, that much is stipulated, but counsel is going somewhat beyond that.

The Court: Now, as to 1945, it is stipulated that the matter of dues, if any, due for 1945 may be eliminated from this action without prejudice?

Mr. Dobrin: That is agreeable to us, and I understand with Mr. Gose.

Mr. Gose: Yes, your Honor.

The Court: Just one moment further. Without requiring Mr. Gose to make any opening statement, and letting him feel that he is fully privileged to reserve any opening statement he would like to make until his case, I will tell him this, that if he feels that it is just as advantageous for the defend-

ant and for himself to make the opening statement now rather than at the beginning of the defendant's case, I think it would be a little easier for me to understand the situation.

Mr. Gose: Yes, your Honor, I would be very happy to make one now, and I think it might be useful if I did so.

The Court: I have read the trial memorandum of counsel for plaintiff.

Mr. Gose: Your Honor is aware of the general issue in the case and the matters shown by the pleadings. The plaintiff is relying on three theories, I gather from the complaint, as the basis of this action:

(1) A series of duly levied assessments, according to the plaintiff's allegation, by the board of directors of the plaintiff corporation.

(2) An alleged agreement to pay these dues.

(3) The third theory is that the defendant is liable because dues coincided, as I understand, with the reasonable benefits received by the defendant.

The defendant denies each of those three propositions in fact. It denies that there are duly levied assessment by the board of directors, although there were certain resolutions adopted by the board of directors touching on the question.

The defendant denies the existence of any agreement in fact.

The defendant denies the reasonable benefit theory as a matter of fact.

In addition, I may say the defendant denies the validity of any part of the transaction as a matter

of law. That is revealed by the various affirmative defenses that are set up.

I may say we deny the existence of any power on the part of the board of directors of the plaintiff corporation under the by-laws of that corporation to levy any assessment on an associate member such as the defendant is in this case. Conceding the existence of that power for the sake of argument only, the power to levy an assessment on an associate member as distinguished from a voting member, we deny that power has been exercised in a manner required by the by-laws.

Primarily, our position is that there has not been a proper procedure followed for the levying of the assessments; and, assuming that there is a power to assess associate members at all, the assessment [3b] must bear uniformly on all of the members of that class, on all associate members, and that in this case the type of assessment involved does not as a matter of fact, as everyone connected with the case knows, bear uniformly on the different associate members.

Mr. Dobrin: Now, your Honor, I don't like to sit——

The Court: (Interposing) Just a minute. Your keeping silent will not be an acquiescence.

Mr. Gose: I quite agree with that.

The Court: When he says everybody knows, that means that that is his contention, that everybody knows.

Mr. Gose: I am perfectly frank to say at this juncture that the primary defense, the one that

I have not yet alluded to and one that the plaintiff in his brief disposes of very summarily, is the defense of illegality of the entire transaction. I have cited cases on that proposition in the brief, the proposition being an assessment of that sort by an employers' association, under squarely decided cases, predicated or tied in to the amount of government contracts, is absolutely contrary to public policy and void where it has even a tendency to induce the bidder on a government contract to include that item as a part of his bid, either in addition to the amount bid or concealed somewhere in the amount bid. I think that point, your Honor, takes care of everything and is absolutely decisive of the case. But I don't by reason of that emphasis wish to minimize the validity of the other defenses at all.

There is another defense that, so far as we made any agreement, if there is one, which we don't [3c] believe as a matter of fact—that there has been a factor of economic compulsion throughout, as a study of the resolutions adverted to in the brief will indicate; and all the way down the line it has been the policy of this plaintiff to crack the whip, if I may use that figure of speech, over this defendant member and other members similarly situated. Or, to use another figure of speech, a member is between the devil and the deep blue sea. If it gets out, it is subject to one penalty; if it stays in, it is subject to another.

I think that about states the content of the defenses we will make. They are more fully elaborated

on in the brief that we filed. I wish to say this though, your Honor, that I think this case loses much of its complexity when the documents involved—and the case is ninety per cent documentary—are carefully examined in their chronological sequence. That, I think, is our duty, to lay the facts before your Honor chronologically.

If there is any other matter I have not touched upon your Honor thinks would help clarify our position in this case, I would be glad to so do. But I believe that about outlines our position.

The Court: All right. You may proceed. [3d]

Mr. Dobrin: I wish to offer in evidence at this time Plaintiff's request for admission under Rule 36 of the Federal Rules of Procedure No. 1 and the amended statement of defendant with respect thereto. Request for admission No. 1 reads as follows: "That Exhibit 1 hereto is a true copy of the constitution and by-laws of the plaintiff as amended and in effect since July, 1937." The defendant by its amended statement with reference to these requests for admissions admits the same.

The Court: Let me hear the begining of that statement.

(Reporter reads same.)

The Court: Is there any objection?

Mr. Gose: There is no objection.

The Court: Such is admitted.

Mr. Dobrin: I now offer in evidence as Exhibit 1 in this trial the Exhibit 1 referred to in the request for admission.

Mr. Gose: No objection.

The Court: Admitted.

(Booklet containing amended articles of incorporation and by-laws of Waterfront Employers Association of the Pacific Coast received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Gose: Did I get lost? You made an offer before that.

Mr. Dobrin: I read the admission, and I am offering the exhibit.

Mr. Gose: The by-laws and constitution?

Mr. Dobrin: That is correct. I now offer in evidence [4] request for admission No. 2 and the admission thereof as follows: "That the defendant by its duly authorized officers signed the constitution and by-laws of the plaintiff on or about July, 1937."

The Court: Admitted.

Mr. Dobrin: I would like to have marked as Plaintiff's Exhibit 2 the amended articles of incorporation and by-laws of Waterfront Employers of Washington.

(Whereupon Amended Articles of Incorporation and By-laws of Waterfront Employers of Washington was marked Plaintiff's Exhibit 2 for identification.)

Mr. Dobrin: I offer in evidence request for admission—first, at this time I ask to have marked as Exhibit 3 for identification Exhibit B to the plaintiff's Bill of Particulars.

The Court: Plaintiff's Exhibit 3 for identification?

Mr. Dobrin: That is correct.

The Court: Being Exhibit B to what?

Mr. Dobrin: Plaintiff's Bill of Particulars.

(Document referred to marked Plaintiff's Exhibit 3 for identification.)

The Court: Is that offered?

Mr. Dobrin: No, just for identification. Counsel advises that he would have no objection to Exhibit 2 and I now offer it.

The Court: Exhibit 2 is admitted.

Mr. Gose: I wish to make a statement on it if your Honor please.

The Court: Just a minute. The admission is [5] vacated and you may make the statement.

Mr. Gose: I intended to indicate to counsel he might offer it. I have no objection to it being admitted but I think in the interest of clarification this statement ought to be made about it because many of the documents—probably I created a wrong impression. It is understood that this corporation Waterfront Employers Association of Washington is a separate corporation from plaintiff and not a subsidiary.

Mr. Dobrin: It is a separate corporation.

Mr. Gose: Is it claimed that it has any legal connection with the Waterfront Employers of the Pacific Coast?

Mr. Dobrin: Yes, certainly. It has many.

Mr. Gose: I think the by-laws and constitution will probably speak on that question.

The Court: Exhibit 2 is admitted.

(Document previously marked Plaintiff's Exhibit 2 for identification was received in evidence.)

The Court: Exhibit 2 is admitted without objection, but in making no objection the defendant is not conceding that the Plaintiff's interpretation of and inferences from the exhibit are to be accepted.

Mr. Dobrin: At this time there is no——

The Court: (Interposing): I say that is what Mr. Gose is anxious about, that he does not concede that what you later will have to say about it is necessarily correct.

Mr. Dobrin: In view of the present admission of Exhibit 2, I offer in evidence Plaintiff's request for [6] admission No. 26, which is admitted by the defendant as follows: "That on and after June 18, 1934, the defendant was and still is a member of the Waterfront Employers of Washington, a corporation."

Mr. Gose: That is admitted.

The Court: Admission 26 admitted in evidence.

Mr. Dobrin: I offer in evidence Request for Admission No. 4, which is admitted by the defendant as follows, "That Exhibit 2 hereto is a true copy of the form of monthly report of tonnage now and at all times mentioned in the Complaint herein provided by the plaintiff for the reporting of cargo tonnage subject to tonnage assessment as fixed by the Board of Directors of the plaintiff."

The Court: That was offered?

Mr. Dobrin: That was offered.

The Court: Admitted.

Mr. Dobrin: Mark this Plaintiff's Exhibit 4 for identification.

(Blank form for monthly report of tonnage marked Plaintiff's Exhibit No. 4 for identification.)

Mr. Dobrin: I now offer in evidence as Plaintiff's Exhibit 4, Exhibit 2 referred to in Admission 4.

Mr. Gose: No objection.

The Court: Exhibit 4 admitted.

(Plaintiff's Exhibit 4 for identification received in evidence.)

Mr. Dobrin: I offer in evidence Admission 5 admitted by the defendant reading as follows: "That Exhibit C to the Plaintiff's Bill of Particulars on file herein sets forth a true copy of the resolution duly [7] adopted by the Board of Directors of the Plaintiff on May 11, 1938.

Mr. Gose: That was admitted.

The Court: Admission 5 admitted in evidence.

Mr. Dobrin: Mark this Plaintiff's Exhibit 5 for identification.

(Resolution marked Exhibit C was marked Plaintiff's Exhibit No. 5 for identification.)

Mr. Dobrin: I offer in evidence as Plaintiff's Exhibit 5, Exhibit C to the plaintiff's Bill of Particulars referred to in Admission No. 5.

Mr. Gose: The minutes of May 11, 1938?

Mr. Dobrin: Yes, that is right.

Mr. Gose: No objection.

The Court: Exhibit 5 for identification admitted.

(Plaintiff's Exhibit 5 for identification received in evidence.)

Mr. Dobrin: I want to stop at this time to read that exhibit to the court. (Reading).

"Whereas the present rate of assessment of the Waterfront Employers Association of the Pacific Coast has been insufficient to meet expenses, and it being determined that additional income will have to be raised for this purpose, now

"Therefore be it resolved that effective June 1, 1938, the rate of assessment levied on all cargo loaded and/or discharged at ports on the Pacific Coast of the United States (except Alaska ports) be as follows:

" 'Off-shore and intercoastal cargo——'

"General cargo, 21½c per manifest ton; lumber, 21½c [8] per thousand feet; bulk cargo dry, 5/10 cents per ton (bulk fluid cargo exempt); trans-shipped cargo, one-half rate of foregoing (each vessel).

" 'Coastwise cargo—one-half off-shore rates paid in and out (when handled by crew and longshoremen), tonnage to be taxed is to be calculated proportionate to man-hours of longshoremen and crew actually handling cargo.'

"Be it further resolved that the notification to members of the increase in assessment rate as provided in the by-laws be accompanied by a letter explaining fully the necessity for increasing the assessment rate at this time."

Mr. Gose: May I inject a suggestion, counsel? You are passing for the time being the exhibit you have marked 3, which is the first resolution of the Board of Directors on the subject of this tonnage.

Mr. Dorbin: I had to do it because you didn't admit it.

Mr. Gose: Yes, I didn't admit it, and the reason I didn't admit it is because you have set up a part of the resolution. I will agree that is Paragraph 2 and reserve the right at a later time to put on the remaining five paragraphs of that resolution. You have set up only Paragraph 2.

Mr. Dorbin: Since that is the only problem that we have got on that, would you give me the minute book?

Mr. Gose: I have a copy of the entire thing prepared for just this purpose if you would like to substitute [9] it.

Mr. Dobrin: I would be very glad to.

The Court: We will give it another number.

Mr. Dobrin: If we can just mark that 3-something else. I would like to have these exhibits in in such a way that when we are all done they will just run chronologically.

The Court: All right. Mark it Exhibit—

Mr. Dobrin: 3-1?

The Court: No, 3-A.

(Document containing copy of resolution of July 31, 1937, referred to marked Plaintiff's Exhibit No. 3-A for identification.)

Mr. Dobrin: All right. Now, as I understand it, you have no objection to my offering Exhibit 3?

Mr. Gose: None at all, except that it is incomplete.

Mr. Dobrin: All right. I didn't want to offer it all, but it will be marked so that it is in its place, and you may offer it when you get there.

The Court: Exhibit 3 is offered.

Mr. Dobrin: First, I want to explain what Exhibit 3 is. I now offer in evidence Request for Admission No. 3 which was denied and which reads as follows, "That Exhibit B to Plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution duly adopted by the Board of Directors of the plaintiff on July 31, 1937," and which I now understand in open court is admitted to contain a part of the resolution adopted.

Mr. Gose: Paragraph numbered 2 of the resolution adopted on that date. [10]

Mr. Dobrin: Your Honor, I now offer in evidence Exhibit 3, which is Exhibit B to the plaintiff's Bill of Particulars referred to.

The Court: Well, was there any objection to your offer in evidence of the request for admission 3?

Mr. Gose: There was a denial of that document. I am perfectly glad to state that we do admit with respect to that request that the document therein referred to is a true copy of Paragraph 2 of the resolution adopted on July 31, 1937, by the Board of Directors.

Mr. Dobrin: And I offer it to that extent only.

The Court: You offer what?

Mr. Dobrin: The admission to that extent only.

The Court: Any objection?

Mr. Gose: No.

The Court: Admitted.

Mr. Dobrin: I now offer Plaintiff's Exhibit 3, being Exhibit B to the plaintiff's Bill of Particulars.

Mr. Gose: No objection.

The Court: Exhibit 3 admitted.

(Document previously marked Plaintiff's Exhibit 3 for identification was received in evidence.)

The Court: And Exhibit 3-A you have identified?

Mr. Dobrin: That is right. I now offer in evidence Plaintiff's Request for Admission No. 6, which is admitted by the defendant, reading as follows, "That Exhibit 3 hereto is a true copy of a letter of May 20, 1938, from the plaintiff which was received by the defendant on or about the date it bears."

The Court: It is offered? [11]

Mr. Dobrin: Yes.

Mr. Gose: No objection.

The Court: Admitted.

Mr. Dobrin: Will you mark this Plaintiff's Exhibit 6 for identification?

(Letter dated May 20, 1938, marked Plaintiff's Exhibit No. 6 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 6, being Exhibit 3 attached to and referred to

in Paragraph 6 of Plaintiff's Request for Admissions.

The Court: Letter of May 20, 1938?

Mr. Dobrin: That is correct.

Mr. Gose: No objection.

The Court: Exhibit 6 admitted.

(Document previously marked Plaintiff's Exhibit No. 6 for identification was received in evidence.

Mr. Dobrin: Now, I want to read this letter to your Honor. It is dated May 20, 1938, addressed to "Members: Effective June 1, 1938, the Board of Directors of the Waterfront Employers Association of the Pacific Coast adopted tonnage assessment rates as follows:

"Off-shore and intercoastal cargo:

"General Cargo, 2½¢ per manifest ton; lumber, 2½¢ per M board feet; bulk dry cargo, 5/10 cents per ton (bulk fluid exempt); trans-shipped cargo, one-half rate of foregoing (each vessel).

"Coastwise Cargo—one-half off-shore rates paid in and out (when handled by crew and longshoremen). Tonnage to be assessed is to be calculated proportionate to man-hours of longshoremen and crew actually handling [12] cargo. Very truly yours, A. Boyd, Secretary-Treasurer, Waterfront Employers Association of the Pacific Coast."

The Court: I think this is an appropriate time for the morning recess, and there will be a ten-minute recess.

(Recess.)

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 7, which is admitted by the defendant, reading as follows: "That Exhibit D to the Plaintiff's Bill of Particulars on file herein sets forth a true copy of the resolution duly adopted by the Board of Directors of the Plaintiff on February 4, 1940," and before completing my offer, I will request Mr. Gose to admit that February 4 should be February 14 and amended accordingly.

Mr. Gose: That is correct. It may be received in evidence. No objection.

The Court: Admitted. So that there will be no misunderstanding, when you say "offer Request for the admission in evidence" are you including with it the admission?

Mr. Dobrin: Yes, I have stated each time "which is admitted" and when I get all done, I will offer the complete set of admissions so that they will all tie in together. But the reason I can't do it because he has put them all in one paragraph, and I can't say Paragraph 1 of his admission or something like that.

The Court: All right.

Mr. Dobrin: Will you mark this Exhibit 7 please.

(Resolution dated February 14, 1940, and marked Exhibit D was marked Plaintiff's Exhibit No. 7 for identification.) [13]

The Court: Exhibit 7 for identification is Exhibit D?

Mr. Dobrin: That is Exhibit D to plaintiff's

Bill of Particulars referred to in Plaintiff's Request for Admission No. 7.

The Court: All right.

Mr. Dobrin: And I offer it.

The Court: Exhibit 7 is offered. Any objection?

Mr. Gose: No objection.

The Court: Admitted.

(Document previously marked Plaintiff's Exhibit 7 for identification was received in evidence.)

Mr. Dobrin: I just wish to call the Court's attention to the fact that this Exhibit D, like the preceding resolution of the Board, sets forth the tonnage assessment, and in this particular one the resolution defines the method of translating a measurement ton into a weight ton.

I offer in evidence Request for Admission No. 8, which is admitted by the defendant, as follows, "That Exhibit E to the plaintiff's Bill of Particulars on file herein sets forth a true copy of the resolution duly adopted by the Board of Directors of the Plaintiff on May 8, 1940."

The Court: Admitted in evidence.

Mr. Dobrin: And for the purpose of the record, so that there can be no question about it, with respect to each of the requests for admissions which I have heretofore offered in evidence, I will also offer in evidence in connection with each the admissions. [14]

The Court: The same are admitted.

Mr. Dobrin: Mark this for identification, please.

(Resolution dated May 8, 1940, and design-

nated Exhibit E was marked Plaintiff's Exhibit 8 for identification.)

Mr. Dobrin: I offer in evidence as Plaintiff's Exhibit 8 for identification Exhibit E to plaintiff's Bill of Particulars referred to in Request for Admission No. 8 and the admission.

Mr. Gose: No objection.

The Court: Exhibit 8 admitted.

(Document previously marked Plaintiff's Exhibit 8 for identification was received in evidence.)

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 9 and Defendant's admission thereof, the request reading as follows, "That Exhibit F to the plaintiff's Bill of Particulars on file herein sets forth a true copy of the resolution duly adopted by the board of directors of the plaintiff on May 8, 1940," and the admission reading, "Defendant admits the same."

The Court: Such is admitted in evidence.

Mr. Dobrin: Mark this Plaintiff's Exhibit 9.

(Resolution dated May 8, 1940, and designated Exhibit F was marked Plaintiff's Exhibit No. 9 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 9, being Exhibit F to the plaintiff's Bill of Particulars referred to in the Request for Admission No. 9 and the admission.

The Court: Exhibit 9 admitted. [15]

(Document previously marked Plaintiff's Exhibit 9 for identification was received in evidence.)

Mr. Dobrin: I want to call the Court's attention to this exhibit, and I will read it. (Reading):

"Be it resolved, that it be the recommendation of this Board of Directors that the final draft of the report on the collection of non-member assessments be left to the discretion of the committee appointed by the Chair, consisting of the managers, contracting stevedores who are ex-officio members of the Board and the Coast treasurer to develop the policy, for assessing and collecting non-member tonnage and that final action taken by the committee and consented to in writing by the majority of the member stevedores in the several ports in connection therewith be approved as the action of this Board.

"(The committee's report as finally adopted is attached and made a part of these minutes.)"

The committee's report attached thereto was the following memorandum agreement:

"May 9, 1940

"Memorandum of Agreement

"Pursuant to resolution of the Board of Directors of the Waterfront Employers Association of the Pacific Coast passed on May 8, 1940, which rescinds the resolution of February 15, 1940, on this subject:

"The stevedore members of the District Waterfront Employers Associations undertake to collect and remit to the Waterfront Employers Associations the uniform Coast tonnage tax on all cargo handled by them for non-member [16] steamship

companies. Each stevedore will include in his contract with non-members——

“The company (here put in name of party to contract) agrees to observe the labor agreements of the Waterfront Employers Association under which this contract is carried on by the stevedores, to which agreements the stevedore is a party; and further agrees to reimburse the stevedore for the port labor charge assessed against the cargo by the Waterfront Employers Association where the labor is performed. For your information, the current rates are:

“As authorized by the enclosed tariff of the Waterfront Employers Association.

“The Coast Association will keep the stevedore members advised through the district association of:

“1. The list of member steamship companies (for whom the stevedore accepts no responsibility for payment of tonnage tax);

“2. Current tonnage assessment rates;

“3. The method and forms of reporting tonnage and remitting assessments.

“The Coast Association will consider relieving member stevedores from payment of tonnage assessments for non-member lines upon written statement of the facts that they have tried but failed to collect under the foregoing contract provisions.

“The District Associations undertake to collect from non-member stevedores for their non-member steamship companies the man-hour charge of 4c in lieu of the membership tonnage, and remit to the Coast Association. [17]

“The foregoing is effective” And there follow places for signatures.

Now I offer in evidence Plaintiff's Request for Admission No. 13 and the admission thereof reading as follows: “That Exhibit 5 hereto is a true copy of the memorandum agreement signed by the defendant on or about May, 1940.”

The Court: Such is admitted in evidence.

Mr. Dobrin: Would your Honor have any objection before putting the number on there to omitting No. 10 for the moment so that I can have this exhibit marked No. 11?

The Court: Do you have something you wish to mark later?

Mr. Dobrin: Yes, later, your Honor.

The Court: I always prefer to have the exhibits numbered consecutively——

Mr. Dobrin: All right.

The Court: ——as identified. If you wish to have some other exhibit identified now, you may.

Mr. Dobrin: That is all right. I will let it go that way. That will be No. 10.

(Letter dated May 10, 1940 marked Plaintiff's Exhibit No. 10 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 10, being the exhibit 5 referred to in the Request for Admission No. 13, being the memorandum agreement signed by the defendant in this case.

The Court: Admitted.

(Document previously marked Plaintiff's Exhibit No. 10 for identification was received in evidence.) [18]

Mr. Dobrin: And I offer in evidence Plaintiff's Request for Admission No. 12 and the admission thereof, the request reading as follows, "That Exhibit 4 hereto is a true copy of the resolution duly adopted by the Board of Directors of the plaintiff on May 9, 1940."

The Court: Such is admitted in evidence.

Mr. Dobrin: Mark this as Plaintiff's Exhibit 11.

(Resolution effective May 1, 1940, and designated Exhibit 4 was marked as Plaintiff's Exhibit 11 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 11, being the exhibit 4 referred to in the previous Request for Admission and Admission.

The Court: Admitted.

(Document previously marked Plaintiff's Exhibit 11 for identification was received in evidence.)

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission 14 and defendant's Admission thereof, the request reading as follows: "That Exhibit G to the Plaintiff's Bill of Particulars on file herein sets forth a true copy of resolution duly adopted by the Board of Directors of the plaintiff on August 14, 1940."

The Court: Such is admitted in evidence.

Mr. Dobrin: This will be Plaintiff's Exhibit 12 for identification.

(Recommendation designated Exhibit G dated August 14, 1940, was marked as Plaintiff's Exhibit No. 12 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 12 for identification, being the exhibit G to the [19] plaintiff's Bill of Particulars referred to in the foregoing admission.

Mr. Gose: The resolution of August 14, 1940?

Mr. Dobrin: That is correct.

The Court: Exhibit 12 admitted.

(Document previously marked as Plaintiff's Exhibit 12 for identification was received in evidence.)

Mr. Dobrin: And I would like to call your Honor's attention to this particular exhibit. This is August 14, 1940, the Board adopting the recommendation,

"The great majority of contract stevedores have voluntarily accepted the program laid down by this board and agreed to be responsible for the collection of assessments on non-member tonnage handled by them. A few firms have thus far refused to accept this responsibility. In fairness to those who have agreed to take it, your committee recommends that formal action be taken by this board making acceptance of responsibility for non-member tonnage assessments a condition of membership for all contracting stevedore firms after a period allowing reasonable notice to those firms who have not voluntarily complied with this requirement."

The Court: Let me see that please (receiving same from Mr. Dobrin).

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 15 and the Defendant's Admission thereof reading as follows, "That Ex-

hibit 6 hereto is a true copy of a letter of August 17, 1940, from the plaintiff which was received by the defendant on or about the [20] date it bears."

The Court: Admitted in evidence.

Mr. Dobrin: Mark this Plaintiff's Exhibit 13.

(Letter dated August 17, 1940, was marked Plaintiff's Exhibit No. 13 for identification.)

Mr. Dobrin: I offer in evidence as Plaintiff's Exhibit 13, being the Exhibit 6 referred to in the preceding admission——

Mr. Gose: Letter of August 17, 1940?

Mr. Dobrin: That is correct.

The Court: Exhibit 13 admitted.

(Document previously marked Plaintiff's Exhibit 13 for identification was received in evidence.)

Mr. Dobrin: I call your Honor's attention to that letter, which is addressed generally to the membership and advises the membership of the preceding resolution which your Honor just read. Mark this Plaintiff's Exhibit 14.

(Resolution dated March 12, 1941, and designated Exhibit H was marked Plaintiff's Exhibit No. 14 for identification.)

Mr. Dobrin: I am merely at this time requesting to have Exhibit H to Plaintiff's Bill of Particulars marked for identification.

The Court: Such has been marked.

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 17 and Defendant's Admission thereof reading as follows——

The Court: Read that again, please.

(Mr. Dobrin's offer read by Reporter.) [21]

Mr. Dobrin: (Resuming) ——"That Exhibit I to the Plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution duly adopted by the board of directors of the plaintiff on April 16, 1942."

The Court: Such is admitted in evidence.

Mr. Dobrin: Mark this please.

(Resolution dated April 16, 1942, and designated Exhibit I was marked as Plaintiff's Exhibit No. 15 for identification.)

Mr. Dobrin: Off the record.

(Discussion off the record.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit No. 15, being resolution of April 16, 1942, and being the exhibit I to the plaintiff's Bill of Particulars referred to in Admission No. 17.

The Court: Exhibit 15 admitted.

(Document previously marked as Plaintiff's Exhibit 15 for identification was received in evidence.)

Mr. Dobrin: And I would like to call that one to your Honor's attention. This is a resolution of April 16, 1942, reading as follows, "Be it resolved that the treasurer of this Association be instructed to request all member companies and contracting stevedores, members of the several port associations, to regularly report at monthly intervals, all tonnage handled by them for the account of the Army and Navy, and that reporting of such tonnage be im-

mediately submitted of all tonnage in the past which has not been so reported to the Association and

“Be it further resolved that the treasurer be authorized [22] to outline to the member companies and contracting stevedores the manner of reporting Army and Navy tonnage to the Association.”

I offer in evidence Plaintiff's Request for Admission No. 18 and Defendant's Admission thereof, the request reading as follows, “That Exhibit 7 hereto is a true copy of letter of April 27, 1942, from the plaintiff which was received by the defendant on or about the date it bears.”

The Court: Such is admitted in evidence.

Mr. Dobrin: Mark this please.

(Letter dated April 27, 1942, was marked Plaintiff's Exhibit No. 16 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 16, being a letter of April 27, 1942, referred to in the preceding request for admissions and being Exhibit 7 attached thereto.

The Court: Exhibit 16 admitted.

(Document previously marked Plaintiff's Exhibit No. 16 for identification was received in evidence.)

Mr. Dobrin: And I would like to read that letter, your Honor, dated April 27, 1942, to Members.

“Re: Tonnage Assessments Army and Navy Cargoes:

“At at meeting of the board of directors of the Coast Association April 16, 1942, the treasurer of the Association was authorized to request all mem-

ber companies and contracting stevedores, members of the several port associations, or associate members of the Coast Association, to regularly report at monthly intervals all tonnage handled by them for account of the Army and Navy, also [23] that all Army and Navy tonnage handled in the past, be immediately reported to the Association, either at San Francisco, or to one of the other port associations in accordance with past practice in reporting tonnage.

“The treasurer was further authorized to outline to the member companies and contracting stevedores, the manner of reporting Army and Navy tonnage to the Association.

“In the past shipping members of the Association have reported all of their own cargo, and such non-member cargo handled where they acted as agents, regardless of whether the stevedoring was done by themselves, or by a contracting stevedore, and all contracting stevedores handling cargo for non-member lines were obligated, by resolution of the board, and by a jointly signed agreement by the contracting stevedores to report to the Association all such non-member tonnage, and also to protect the Associations' tonnage and assessments.

“It is our understanding, under the present or proposed Army and Navy contracts under which Army and Navy cargoes are handled, that provision is made therein for paying a portion of the Association's tonnage assessments to the contracting stevedore handling such cargo, but no provision is made for paying any portion of the tonnage

assessment to the steamship company who acts as terminal operator in connection with the same cargo under terminal contract with the Army and Navy.

“In light of the above, it is requested that all contracting stevedores, members of the several Port Associations, and steamship operators who handle their own [24] stevedoring operations, report monthly on the regular tonnage assessment forms, which have been in use for some years, all cargoes handled by them for the Army and the Navy, making such reportings on a separate report from any commercial cargoes, if any, which they handle.

“By making reportings in this manner it will enable the Association to keep track of the tonnage handled, and render tonnage assessments at the rates now in effect and established by the Coast board, although the rates set forth in the Army contract does not coincide with the Association’s tonnage assessment rate.

“At the April 16 meeting of the board, a committee was authorized to make a study and recommend to the board the rate for tonnage assessments to be levied in connection with Army and Navy tonnage handled by steamship companies, or contracting stevedores, members or associated members of this Association. However, until such time as the board changes the assessment rate, the base rate of 21½¢ per ton still prevails, and none other can be recognized until a change in the rate is made by the board in conformity with the by-laws of the Association.

“Full circularization is being made to all mem-

bers and associate members in all ports, in order that there may be no misunderstanding, and all concerned are respectfully requested to promptly comply with the request outlined in this letter.

"Yours very truly, A. Boyd, Secretary-Treasurer, Waterfront Employers Association of the Pacific Coast."

I offer in evidence Plaintiff's Request for Admission [25] No. 19 and Defendant's Admission thereof, the request reading as follows: "That Exhibit J to the Plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution duly adopted by the Board of Directors of the Plaintiff on June 25, 1942."

The Court: Admitted in evidence.

Mr. Dobrin: Mark this, 17.

(Resolution dated June 25, 1942, and designated Exhibit J was marked Plaintiff's Exhibit No. 17 for identification.)

(Plaintiff's Exhibit No. 17 for identification was offered and admitted in evidence.)

Mr. Dobrin: I wish to read that one to your Honor. That is dated June 25, 1942. (Reading):

"Be it resolved that the treasurer be authorized to advise the contracting stevedores and steamship companies doing stevedoring both of which are members of either Coast Association or one of the Port Associations, that the contracting stevedores or the steamship companies doing stevedoring of cargo for either the Army, Navy or WSA is obligated to report the tonnage so handled and pay the

assessment to the Association in the same manner that non-member tonnage has been reported to the Association; and

“Be it further resolved, that the Board reaffirm the base rate of assessment as 21½¢ per ton now in force on commercial cargo.”

I offer in evidence Plaintiff's Request for Admission No. 20 and Defendant's Admission thereof, the request reading as follows, “That Exhibit 8 hereto is a [26] true copy of a letter of July 1, 1942.”

The Court: Exhibit 8?

Mr. Dobrin: 8, yes. “——is a true copy of a letter of July 1, 1942, from the Plaintiff, which was received by the defendant on or about the date it bears.”

The Court: Admitted in evidence.

Mr. Dobrin: Mark this 18.

(Letter dated July 1, 1942, was marked Plaintiff's Exhibit No. 18 for identification.)

Mr. Dobrin: I offer Plaintiff's Exhibit 18 for identification, being letter of July 1, 1942, and being Exhibit 8 referred to in the preceding Request for Admission No. 20.

The Court: 18 is admitted.

(Document previously marked Plaintiff's Exhibit No. 18 for identification was received in evidence.)

Mr. Dobrin: And I would like to read that to your Honor. It is dated July 1, 1942. (Reading):

“To Members: Re: Tonnage Assessments, Army, Navy and War Shipping Administration:

“On April 27 last, members were fully advised as to the procedure to be followed in reporting tonnage and collecting assessments dealing with Army and Navy cargoes and since that time contracts have been consummated with the War Shipping Administration, and the Board by resolution at its meeting of June 25, authorized the treasurer to advise all members as to method of reporting tonnage on any such cargoes and the payment of the assessment to the Association. The substance of the authorization was as [27] follows:

“That the contracting stevedores and steamship companies doing stevedoring, both of which are members of either the Coast Association or one of the Port Associations which handle cargoes for either the Army, Navy or the War Shipping Administration, is obligated to report the tonnage so handled and pay the assessment to the Waterfront Employers Association of the Pacific Coast or either of the Port Associations in the same manner that non-member tonnage has been reported to the Association in the past.

“The Board again reaffirmed its position that the base rate of assessment on all tonnage handled for either the Army, the Navy or the War Shipping Administration is $2\frac{1}{2}$ c per ton, the rate which is now in force on commercial cargoes.

“Full circularization is being made of this material to all members and associate members in all ports in order that there may be no misunderstanding, and all concerned are urgently requested to promptly comply with the procedure outlined in

this letter and should any points not be clear to communicate with this office.

“Very truly yours, A. Boyd, Secretary-treasurer, Waterfront Employers Association of the Pacific Coast.”

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 21 and Defendant's Admission thereof, the request reading as follows, “That the copy of letter of October 27, 1942, to the defendant signed by [28] K. J. Middleton on behalf of the plaintiff and being Exhibit N, pages 1 and 2, to the plaintiff's Bill of Particulars on file herein, is a true copy of the original received by the defendant on or about the date it bears.”

The Court: Admitted in evidence.

Mr. Dobrin: Mark this, please.

(Letter dated October 27, 1942, and designated Exhibit N was marked Plaintiff's Exhibit No. 19 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 19, letter of October 27, 1942, and likewise being the Exhibit N to the plaintiff's Bill of Particulars referred to in the Request for Admission No. 21.

The Court: Admitted.

(Document previously marked as Plaintiff's Exhibit No. 19 for identification was received in evidence.)

Mr. Dobrin: I would like to read it to your Honor, and I may say—

The Court: (Interposing) I will say, counsel,

that I will gain a great deal of time if you will hand the exhibit to me.

Mr. Dobrin: I will be very happy to. I am only trying to be helpful by the method I was following.

(Court reads Plaintiff's Ex. 19.)

The Court: All right. You may proceed.

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 22 and Defendant's Admission thereof, the request reading as follows, "That copy of [29] letter of November 2, 1942, from the defendant signed by F. E. Settersten, addressed to K. J. Middleton, Waterfront Employers of Washington, being Exhibit O to the plaintiff's Bill of Particulars on file herein, is a true copy of the original delivered by the defendant to the plaintiff on or about the date it bears."

The Court: Admitted in evidence.

Mr. Dobrin: Mark this please.

(Letter dated November 2, 1942, and designated Exhibit O was marked Plaintiff's Exhibit No. 20 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 20, being the letter referred to in the preceding Request for Admission No. 22 dated November 2, 1942, and being Exhibit O to the plaintiff's Bill of Particulars.

The Court: Admitted.

(Document previously marked Plaintiff's Exhibit No. 20 for identification was received in evidence.)

(Court reads same.)

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 23 and defendant's Admission thereof, the request reading as follows, "That Exhibit K to the Plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution duly adopted by the Board of Directors of the plaintiff on November 11, 1942.

The Court: Admitted.

Mr. Dobrin: Mark this please.

(Resolution dated November 11, 1942, and designated Exhibit K was marked Plaintiff's Exhibit No. 21 for identification.) [30]

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 21 for identification, being the Exhibit K to plaintiff's Bill of Particulars referred to in Plaintiff's Request for Admission No. 23.

The Court: Admitted.

(Document previously marked Plaintiff's Exhibit No. 21 for identification was received in evidence.)

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 24 and defendant's admission thereof, the request reading as follows: "That Exhibit L to the plaintiff's Bill of Particulars on file herein sets forth a true copy of a resolution duly adopted by the Board of Directors on November 12, 1942."

The Court: Admitted.

Mr. Dobrin: Mark this please.

(Resolution dated November 12, 1942, designated Exhibit L was marked Plaintiff's Exhibit No. 22 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 22 for identification, being the Exhibit L to the plaintiff's Bill of Particulars referred to in the preceding request for admission No. 24.

The Court: Exhibit 22 admitted.

(Document previously marked Plaintiff's Exhibit 22 for identification was received in evidence.)

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 25 and Defendant's Admission thereof, the Request for Admission reading as follows, "That the copy of the special committee report set forth on Exhibit L—" which I may say parenthetically is now [31] Exhibit 22 in this case—"Exhibit L to the Plaintiff's Bill of Particulars on file herein is a true copy of the Special Committee report attached to the resolution adopted by the Board of Directors of the plaintiff on November 12, 1942 as set forth on Exhibit L to said Bill of Particulars."

The Court: Admitted in evidence.

Mr. Dobrin: And may it be agreed that that admission is amended by the statement that Exhibit L is Exhibit 22?

Mr. Gose: Yes, Exhibit 22 now includes both the resolution of the Board of Directors and the committee report adopted by that resolution.

Mr. Dobrin: That is right. I offer in evidence Plaintiff's Request for Admission No. 27 and the defendant's Admission thereof, the request reading as follows: "That Exhibit 9 hereto is a true copy

of the resolution duly adopted by the Board of Directors of the plaintiff on February 25, 1943."

The Court: Admitted in evidence.

Mr. Dobrin: Mark this please.

(Resolution dated February 24, 1943, and designated Exhibit 9 was marked Plaintiff's Exhibit No. 23 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 23 for identification, being the Exhibit 9 attached to plaintiff's Request for Admission No. 27, or being the resolution adopted by the Board of the plaintiff on February 24, 1943.

The Court: Exhibit 23 admitted. [32]

(Document previously marked Plaintiff's Exhibit No. 23 for identification was received in evidence.)

Mr. Dobrin: Would you have any objection, Mr. Gose; for me to write in ink on Exhibit 23 as admitted the date February 25, 1943?

Mr. Gose: You mean across the top by way of caption?

Mr. Dobrin: Yes.

Mr. Gose: I think that would be helpful.

The Court: The trial of this case will be recessed until 2:00 o'clock.

(Whereupon, a recess herein was had until 2:00 p. m.)

The Court: You may proceed.

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 16, which reads as follows, "That Exhibit H to the Plaintiff's Bill of Particu-

lars on file herein sets forth a true copy of the resolution duly adopted by the Board of Directors of the plaintiff on March 12, 1942." May I make this statement in reference to Exhibit H? Exhibit H has now been marked for identification in this case as Plaintiff's Exhibit 14.

The Court: Plaintiff's Exhibit 14 for identification?

Mr. Dobrin: Yes. And I also offer in evidence, and will ask Mr. Gose to agree, if he will, that the defendant now admits that request.

Mr. Gose: That is correct. Defendant does now [33] admit that request.

The Court: The same is admitted.

Mr. Dobrin: I now offer in evidence Exhibit 14.

The Court: The same is admitted.

(Document previously marked Plaintiff's Exhibit No. 14 for identification was received in evidence.)

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 28 (A), which reads as follows, "That a meeting of the Board of Directors of the Waterfront Employers of Washington was duly held on March 10, 1943, at which said meeting F. E. Settersten and M. E. Hay, representing the defendant, were present, together with a committee from San Francisco consisting of W. J. Bush, Thomas James, J. A. Lunny and W. T. Sexton, representing the plaintiff and appointed pursuant to the resolution of the Board of Directors of the plaintiff as set forth on Exhibit 9 hereto." The

Exhibit 9 referred to is Plaintiff's Exhibit 23 now admitted in this case.

And I offer in evidence the Defendant's Admission to that request, and, Mr. Gose, will that be amended by the statement I just made?

Mr. Gose: Yes.

Mr. Dobrin: The admission reads as follows, "Defendant admits the truth of the facts stated in Item 28(a), except that defendant denies any implication contained therein that the persons named therein were the only persons present at said meeting."

The Court: Such is admitted.

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 28 (B), reading as follows, [34] "That at said meeting of the Board of Trustees of the Waterfront Employers of Washington held on March 10, 1943, M. E. Hay on behalf of the defendant, as his client and principals, stated as follows: 'That his principals had met with the committee from San Francisco and had ironed out with them certain matters which had been misunderstood or in dispute and that his client felt that, having accepted benefits of the Coast Association, there was a moral obligation to pay for such benefits, that the matter of legal liability was waived, and that his client would pay back assessments of 2½¢ a ton, and future assessments made by the Coast Association, the method of payment to be arrived at with the San Francisco committee following adjournment of this meeting'."

The defendant's amended statement in reference

thereto, Paragraph 3, "Defendant admits, with respect to Item 28 (b) that the statements therein attributed to 'M. E.' are a paraphrase of a part of what was said at said meeting by E. M. Hay, but defendant denies any possible implication that the statement as set forth expresses the verbatim language used by E. M. Hay or that the said statement constitutes all that was said by Mr. Hay at the meeting with respect to the subject matter contained in the quoted statement."

I offer that.

The Court: Such is admitted.

Mr. Dobrin: Mark this please.

(Minutes of meeting of Board of Trustees, Waterfront Employers of Washington, March 10, 1943, was marked Plaintiff's Exhibit No. 24 for identification.) [35]

Mr. Dobrin: Do you wish to inspect that?

Mr. Gose: No. No objection to that.

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 24.

The Court: What is it?

Mr. Dobrin: Now, that is the minutes of a meeting of the Board of Trustees of March 10, 1943, to which the request for admissions 28 (A) and 28 (B) pertain.

The Court: Was it an exhibit to 28 (B)?

Mr. Dobrin: No, it was a separate document. It is the minutes of that meeting which is referred to in 28(A) and 28(B). I am offering it.

The Court: Exhibit 24 admitted.

(Document previously marked Plaintiff's Ex-

hibit 24 for identification was received in evidence.)

Mr. Dobrin: And I would like to have your Honor take the time to read that exhibit.

The Court: All right.

(The Court reads Plaintiff's Exhibit No. 24.)

Mr. Dobrin: Mark this please.

(Letter dated March 11, 1943 was marked Plaintiff's Exhibit No. 25 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 25.

Mr. Gose: No objection.

The Court: Admitted.

(Document previously marked Plaintiff's Exhibit No. 25 for identification was received in evidence.)

Mr. Dobrin: I offer in evidence in connection [36] with Exhibit 25 Plaintiff's Request for Admission 29, and Defendant's Admission thereof, the request reading as follows, "That the copy of the letter of March 11, 1943 from the defendant, signed by M. E. Hay"—that should be E. M. Hay—"Secretary, addressed to the Committee, Waterfront Employers Association of the Pacific Coast, set forth on Exhibit P (page 1) to the Plaintiff's Bill of Particulars on file herein, is a true copy of the original delivered by the defendant to the plaintiff on or about the date it bears." And I would like to modify both the request and the admission by changing that portion of it that refers to the letter

as Exhibit P (page 1) to include also the same exhibit as No. 25 in this trial.

Mr. Gose: I am a little lost there, counsel.

Mr. Dobrin: The letter is referred to as Exhibit P (page 1) to the Plaintiff's Bill of Particulars. It is now also Exhibit 25.

Mr. Gose: If that is the same letter that you just now introduced in evidence as Plaintiff's Exhibit 25, that is agreed to.

The Court: Admitted in evidence.

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 30 and the Defendant's Admission thereof, the request reading as follows, "That subsequent to March 11, 1943 the defendant paid to the plaintiff the amounts asserted by the defendant to be the balance due on the tonnage assessment owing to the plaintiff from the defendant for the period ending December 31, 1942."

The Court: Admitted in evidence. [37]

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission No. 31 and Defendant's Admission thereof, reading as follows, "That since the period ending March 31, 1942 the defendant has failed to report to the plaintiff on said form, Exhibit 2 hereto, all of the cargo tonnage handled by the defendant and claimed by the plaintiff to be subject to the tonnage assessment and has not paid the tonnage alleged to be due thereon."

The Court: Admitted in evidence.

Mr. Dobrin: With counsel's permission, I would like an agreement that the Exhibit 2 referred to

in Request for Admission No. 31 is Exhibit 4 introduced in evidence.

Mr. Gose: That is correct.

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission 32(A) and Defendant's Admission thereof, reading as follows, "That on or about February 1944 and prior to the institution of this action the defendant made a tender to the plaintiff of a check in the amount of \$17,364.51, which check had endorsed thereon 'In full payment of 1943 tonnage assessments'."

The Court: Admitted in evidence.

Mr. Dobrin: I offer in evidence Plaintiff's Request for Admission 32 (B) and Defendant's Admission thereof, the request reading as follows, "That said tender and check were not accepted by the plaintiff."

The Court: Admitted in evidence.

Mr. Dobrin: Off the record.

(Request for Admission under Rule 36 of the Federal Rules of Civil [38] Procedure marked Plaintiff's Exhibit No. 26 for identification.)

(Amended Statement of Defendant with Respect to Plaintiff's Request for Admission under Rule 36 marked Plaintiff's Exhibit No. 27 for identification.)

Mr. Dobrin: I offer in evidence the original of Plaintiff's Request for Admission Under Rule 36 of the Federal Rules of Civil Procedure, omitting therefrom only those portions thereof which have

been abstracted from it and otherwise marked as exhibits in the case.

The Court: I don't quite understand what you mean.

Mr. Dobrin: You see what we have done——

The Court: (Interposing) Let me look at it.

Mr. Dobrin: We have taken all the exhibits off and had them marked and offered them in evidence. I think I will withdraw that offer. I am afraid it will be confusing. There are some things that do not deal with——

The Court: They have been marked:

Mr. Gose: That was 26 and 27?

Mr. Dobrin: Yes.

The Court: That is, the Request for Admission is 26 and Exhibit 27 is the Amended Statement of Defendant With Respect to Plaintiff's Request for Admissions Under Rule 36?

Mr. Dobrin: I am not going to offer it. I am afraid it will add to confusion. I offer in evidence Interrogatory 15 submitted by the plaintiff to the defendant and defendant's Answer thereto, the interrogatory reading as follows, "At what rate of tonnage assessment [39] was the sum of \$17,364.51 tendered to the plaintiff prior to the institution of this action calculated?"

And the Answer, "11¼c per ton."

The Court: Such are admitted in evidence.

Mr. Dobrin: I offer in evidence Interrogatory No. 1 and the first and second paragraphs of the answer thereto, Interrogatory 1 reading as follows, "For the period March 1, 1942 to the date of your

answer or for the period next preceding the date of your answer for which information is available, furnish all the information as called for on Exhibit 1 attached hereto, omitting the certification and following the instructions contained thereon, disclosing all cargo which the defendant has loaded to or discharged from vessels during said period." And with counsel's permission I would like to make this statement as an accurate statement, that the Exhibit 1 referred to in the interrogatory is Exhibit 4 in this case.

Mr. Gose: The tonnage report form?

Mr. Dobrin: That is right. And this portion of the answer thereto is being offered, "There are furnished herewith, marked as Exhibits 1 to 18 inclusive, monthly reports of tonnage on forms provided by plaintiff showing all cargo handled by defendant for the War Shipping Administration for the period from March 1, 1942 to January 31, 1945."

The Court: That is all offered?

Mr. Dobrin: Yes.

The Court: Without objection, it is admitted in evidence. [40]

Mr. Gose: There is more to the answer to that interrogatory.

Mr. Dobrin: Just give me time. It will all go in. Mark this please.

(Eighteen monthly tonnage reports designated 1 to 18, inclusive, were marked Plaintiff's Exhibit No. 28 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 28 for identification, which are the exhibits

referred to in the answer to the interrogatory previously read as Exhibits 1 to 18.

The Court: Admitted.

(Documents previously marked for identification as Plaintiff's Exhibit No. 28 were received in evidence.)

Mr. Dobrin: I ask your Honor to inspect that exhibit only for the purpose of seeing the dates that it covers, and I call your Honor's particular attention to the last one, showing report for May 1944.

The Court: All right.

Mr. Dobrin: I now offer in evidence the third paragraph of the answer to Interrogatory No. 1, reading as follows, "The defendant has been advised by the Judge Advocate General of the United States Army that it may furnish to the plaintiff information as to the amount of cargo handled by defendant for the United States Army but that such information should be given only upon a calendar year basis and without indicating the particular amount carried by any ship. A copy of the letter from the Judge Advocate General on this subject is hereto attached, [41] marked Exhibit A. In accordance with the permission therein contained, the defendant states that from March 1, 1942 to December 31, 1944, it has provided stevedoring service to vessels carrying cargo for the United States Army and that the volume of the cargo handled by the defendant is as follows: From March 1, 1942 to December 31, 1942—714,817 tons: From January 1, 1943 to De-

ember 31, 1943—1,389,161 tons: From January 1, 1944 to December 31, 1944—1,589,681 tons.

“No other cargo than hereinbefore mentioned has been handled by the defendant during the periods above mentioned.”

Mr. Dobrin: I offer that.

The Court: Admitted.

Mr. Dobrin: Off the record.

(Discussion off the record.)

Mr. Dobrin: Mark this please.

(Letter dated January 18, 1945 marked Plaintiff's Exhibit No. 29 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 29 for identification. Your your Honor's information, this is the Exhibit A referred to in the last answer to Interrogatory 1, which was admitted in evidence.

The Court: That is in Paragraph 3?

Mr. Dobrin: That is right, your Honor.

The Court: Exhibit 29 admitted.

(Document previously marked Plaintiff's Exhibit No. 29 for identification was received in evidence.)

Mr. Dobrin: I offer in evidence Plaintiff's Interrogatory No. 2 to the defendant reading as follows: “In connection [42] with your answer to Interrogatory No. 1, state or indicate in the information supplied in respect thereto the cargo tonnage listed therein which you have heretofore reported to the plaintiff, the date of such report, the amount

of tonnage assessment paid on each report and the date of such payment."

And the first paragraph of the answer thereto as follows, "All of the cargo handled by the defendant for the account of the War Shipping Administration, as stated in the answer to Interrogatory No. 1, has been heretofore reported to the plaintiff, and the so-called tonnage assessment of 2½¢ per ton has been paid thereon by the defendant to the plaintiff. There is attached hereto, marked Exhibit B, a schedule showing the date of all such reports and the dates and amounts of all payments made thereon."

The Court: Admitted.

Mr. Dobrin: Mark this.

(Document designated Exhibit B, Tonnage Reported to Waterfront Employers of Washington on War Shipping Administration ships, was marked Plaintiff's Exhibit No. 30 for identification.)

Mr. Dobrin: I offer Plaintiff's Exhibit 30 for identification, which is the Exhibit B referred to in the paragraph of the answer to Interrogatory No. 2 which has just been admitted in evidence.

The Court: Admitted.

(Document previously marked Plaintiff's Exhibit No. 30 for identification was received in evidence.)

Mr. Dobrin: I would like to have your Honor examine [43] it if you will please.

(Court examines same.)

Mr. Dobrin: And I call your Honor's attention particularly to the dates of payment on that tonnage as you will see in the second from the last column.

The Court: All right.

Mr. Dobrin: I now offer in evidence the second paragraph of answer to Interrogatory No. 2——

The Court: Admitted.

Mr. Dobrin: ——reading as follows, “Defendant has also reported to and paid the plaintiff the so-called tonnage assessment of $2\frac{1}{2}c$ per ton on all cargo handled by it for the United States Army up to December 31, 1942, as shown in the answer to Interrogatory No. 1 above. There is hereto attached, marked Exhibit C, a schedule showing the dates of payment and the amounts paid at $2\frac{1}{2}c$ per ton on account of such Army cargo for said period from March 1, 1942 to December 31, 1942.

The Court: If my admission was premature, counsel for defendant will understand such counsel may object. I assume there is none.

Mr. Gose: No objection.

The Court: The admission stands.

Mr. Dobrin: Mark this please.

(Document designated Exhibit C, Tonnage Reported on United States Army Cargo from March 1, 1942 to December 31, 1942, inclusive, marked Plaintiff's Exhibit 31 for identification.)

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 31, being the Exhibit C referred to in that portion [44] of the answer to Interrogatory No. 2 last admitted.

No. 11437

United States
Circuit Court of Appeals
For the Ninth Circuit.

GRIFFITHS AND SPRAGUE STEVEDORING
COMPANY, INCORPORATED, a corpora-
tion,

Appellant,

vs.

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST, a corporation,
Appellee.

Transcript of Record

In Two Volumes

VOLUME II

Pages 299 to 618

Upon Appeal from the District Court of the United States
for the Western District of Washington
Northern Division

FILED

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Upon Appeal from the District Court of the United States
for the Western District of Washington
Northern Division

The Court: 31 admitted.

(Document previously marked Plaintiff's Exhibit No. 31 for identification was received in evidence.)

Mr. Dobrin: I would like to have your Honor view that.

(Court does so.)

Mr. Dobrin: I offer in evidence the third and fourth paragraphs of the answer to Interrogatory No. 2 reading as follows: "Defendant further reported to the plaintiff, in writing, on or about January 25, 1944, all tonnage handled by it for the United States Army for the calendar year 1943 in the amount of 1,389,161 tons, being the same amount shown in the answer to Interrogatory No. 1 above. This report was accompanied by a tender of the sum of \$17,364.51, as a full voluntary payment of the so-called tonnage tax for the calendar year 1943.

"Defendant has at no time prior hereto reported the amount of any tonnage handled by it for the United States Army after December 31, 1943, nor has any amount been paid on any such tonnage handled after December 31, 1943."

The Court: Admitted in evidence.

Mr. Dobrin: I offer in evidence Interrogatory No. 6 submitted by plaintiff to defendant and the defendant's answer thereto reading as follows: "Interrogatory No. 6. Did the plaintiff prior to institution of this action perform any of its purposes and objects as set forth in Paragraph 2 of

the Complaint in which you participated or in which you enjoyed the benefits?" To [45] which the defendant's answer was: "Yes."

The Court: Admitted in evidence.

Mr. Dobrin: I offer in evidence Interrogatory No. 7 submitted by Plaintiff to defendant and defendant's answer thereto, Interrogatory No. 7 reading as follows: "Has the plaintiff since the institution of this action performed any of its purposes and objects as set forth in Paragraph 2 of the Complaint in which you have or now are participating or enjoying the benefits?" To which the defendant answered "Yes."

The Court: Admitted in evidence.

Mr. Dobrin: I offer Interrogatory No. 8 and defendant's answer thereto, Interrogatory No. 8 reading as follows: "If your answer to Interrogatory No. 6 is in the affirmative, state the nature and extent of the performance of said purposes and objects together with the nature and extent of your participation therein and enjoyment of the benefits thereof and for what period of time." To which the defendant answered as follows: "The plaintiff prior to the institution of this action negotiated contracts with the labor union of which the defendant's longshoremen employees are members, and the defendant at all times while such contracts were in force hired its said employees in accordance with such contracts."

The Court: Admitted in evidence.

Mr. Dobrin: I offer Interrogatory No. 9 and defendant's answer thereto, Interrogatory No. 9

reading as follows: "If your answer to Interrogatory No. 7 is in the affirmative, state the nature and extent of the performance of such purposes and objects together with the [46] nature and extent of your participation therein and enjoyment of the benefits thereof and for what period of time." To which the defendant answered: "Since the institution of this action the plaintiff has continued to negotiate labor contracts on behalf of its membership, and defendant has continued to employ long-shoremen in accordance with the terms of such contracts."

The Court: Admitted in evidence.

Mr. Dobrin: I offer Interrogatory 12-A submitted by plaintiff to defendant and defendant's answer thereto.

The Court: 12?

Mr. Dobrin: 12-A, Interrogatory 12-A reading as follows: "What office or offices has F. E. Settersten held in the defendant, and what position or positions has he held with the defendant for the years 1942, 1943 and 1944, giving the period by dates of each?"

To which the defendant answered, "President and director during entire period."

The Court: Admitted.

Mr. Dobrin: I offer plaintiff's Interrogatory 12-B submitted to defendant and defendant's answer.

The Court: 12-E?

Mr. Dobrin: 12-B.

The Court: 12-B.

Mr. Dobrin: Interrogatory 12-B reading as fol-

lows: "What office or offices has M. E. Hay held in the defendant and what position or positions has he held with the defendant for the year 1942, 1943 and 1944, giving the period by date of each?" To which the defendant answered: "E. M. Hay (not M. E. Hay) held the positions [47] of Secretary-Treasurer and Director during all of these three years."

The Court: Admitted in evidence.

Mr. Dobrin: Interrogatory 12-C submitted by plaintiff to defendant and defendant's answer thereto, Interrogatory 12-C reading as follows: "What office or offices has M. J. Weber held in the defendant and what position or positions has he held with the defendant for the years 1942, 1943 and 1944, giving the period by dates of each?" To which the defendant answered, Vice-President during the entire period."

The Court: Admitted in evidence.

Mr. Dobrin: Mark this please.

(Minutes of joint meeting of Committee of Seattle and San Francisco Representatives Regarding Assessments marked Plaintiff's Exhibit No. 32 for identification.)

Mr. Dobrin: I am not offering it at this time.

Mr. Gose: I would like to examine it.

Mr. Dobrin: Surely, but I am not offering it yet. Mark this please.

(Excerpt from Minutes of Meeting of the Board of Directors of the Waterfront Employers Association of the Pacific Coast marked Plaintiff's Exhibit 33 for identification.)

Mr. Dobrin: I am not offering it at this time. Mark this please.

(Agreement Between District No. 1 of International Longshoremen's & Warehousemen's Union and Waterfront Employers Association of the Pacific Coast marked Plaintiff's Exhibit No. 34 for identification.) [48]

Mr. Dobrin: I am not offering it at the present time.

The Court: There will be a recess for ten minutes.

(Recess.)

Mr. Dobrin: I will call Mr. Foisie.

F. P. FOISIE

being first duly sworn, testified on behalf of Plaintiff as follows:

Direct Examination

By Mr. Dobrin:

Q. State your full name.

A. F. P. Foisie.

Q. Where do you reside?

A. Berkeley, California.

Q. Are you associated in any way with the Waterfront Employers Association of the Pacific Coast? A. Yes, as president.

Mr. Dobrin: With the Court's and counsel's

(Testimony of F. P. Foisie.)

permission—that is a long name, and I will hereafter refer to it as the Coast Association.

Mr. Gose: Yes.

The Court: Just a minute. This is the Waterfront Employers Association of the Pacific Coast?

Mr. Dobrin: Yes. We are so much in the habit of calling it that.

The Court: All right. Call it Coast Association, the plaintiff.

Q. How long have you been the president?

A. Since January, 1939. [49]

Q. And what prior position, if any, did you hold with any organization of persons engaged in waterfront work prior to that time?

A. Coordinator for the several port associations of Southern California, San Francisco, Portland and Seattle from 1935 to 1939; and industrial relations manager of the Waterfront Employers of Seattle from 1920 to 1934.

The Court: Let me get those dates.

The Witness: Coordinator for the port associations from 1935 to 1939, and from 1920 to 1934 I was industrial relations manager for the Waterfront Employers of Seattle.

Q. What date did you give as coast coordinator?

A. 1935 to 1939, to January 1, 1939.

Q. When you became president of plaintiff?

A. Yes.

Q. Now, you referred to the Waterfront Employers of Seattle; has the name of that association been changed?

(Testimony of F. P. Foisie.)

A. It has, to the Waterfront Employers of Washington.

Q. Waterfront Employers of Washington?

A. Yes.

Q. What qualification by training did you have for the work that you have described?

Mr. Gose: What issue is this addressed to, counsel, might I inquire?

Mr. Dobrin: Well, it is addressed to the whole subject in this case. I can't point to any specific item.

Mr. Gose: I don't believe, if your Honor please, that the particular qualifications of this witness for his job are in issue here. [50]

The Court: I assume it is preliminary.

Mr. Dobrin: Wholly so.

The Court: If you have an objection, it is overruled.

A. First as a wage worker. Then through quite a substantial period of years training and specializing in economics and labor government, and then through the war in the rehabilitation of returned service men and re-employment. Then to the special job of the Waterfront Employers, beginning in 1920 and continuing ever since. Then a full year of research and travel covering all the ports of this country in person, spending a full year in specialized study under a research foundation for the betterment of industrial relationships.

Q. Now, prior to the formation of the Coast

(Testimony of F. P. Foisie.)

Association, what form of associations, if any, existed on the Pacific Coast?

A. So-called port associations, which were larger than the single port in most instances. They covered the area; but the major port in each area usually gave to the name of the association the name of that larger port. For example, Waterfront Employers of Seattle, later changed to Waterfront Employers of Washington. Waterfront Employers of Portland continues to this day; Waterfront Employers Association of San Francisco and the Waterfront Employers Association of Southern California, the latter two in the last year having been combined into the Waterfront Employers Association of California.

Q. Now, can you give us the dates of the formation of those various local associations? [51]

A. The history of the Seattle Association dates clear back to 1908; San Francisco to 1913; Portland to 1921; Southern California, 1923.

The Court: San Francisco in 1913?

The Witness: San Francisco, 1913.

The Court: And Portland what date?

The Witness: 1921.

The Court: At Southern California?

The Witness: 1923.

Q. Now, as manager of the Waterfront Employers of Seattle, now the Waterfront Employers of Washington, what were your duties?

A. I was responsible to the directors and to the members for the development of all the relation-

(Testimony of F. P. Foisie.)

ships with the longshoremen contractually by agreement, the development of accident prevention work, the setup of a central pay service and handling of grievances; the setting up of a plan of joint employee representation at that time, and in all other respects I managed the Association in its labor relations, and there was no other aspect of the Association's work; it confined itself to that.

Q. What were your duties commencing in 1935 as Coast Coordinator and for whom were you functioning?

Mr. Gose: If the Court please, I am going to object to this line of inquiry. I can't see by any stretch of the imagination what Mr. Foisie's activities or his duties in connection with a particular job have to do with the issue in this case.

Mr. Dobrin: It is wholly preliminary.

The Court: Just a minute. I will concede, [52] counsel, that I am not convinced that it is necessary. I can see no hurt——

Mr. Gose: (Interposing) Except consumption of time.

The Court: I will say I can see no hurt except consumption of time, and I will risk that.

Mr. Dobrin: Read the question.

(Question read.)

A. Beginning in 1934, with an award of the President's Board, called the National Longshoremen's Board, there was created a Coast agreement with the Longshoremen's Union. That gave rise immediately to the necessity of some coordination

(Testimony of F. P. Foisie.)

between the four port associations. Since there was no Coast Association and no thought of one at that time, it led the four port associations to agree upon coordination of their efforts without a combination. I was asked to take that work over, and left Seattle for that work, making my headquarters in San Francisco. I was paid by the several port associations proportionately to their tonnage. I carried on work as the coordinator between the ports. I met with the directors of the four port associations from time to time and did their bidding as their servant.

Q. Now, you referred to the President's Boards Award in 1934 as creating a coastwide contract. Would you explain to the Court what you mean by that?

A. That was a determination by the parties in dispute in 1934 agreeing to surrender to this Board as a Board of Arbitration the right to determine among other issues whether there should be one longshore contract uniform and [53] covering all of the four port associations on the employers' side and a single union or different union locals on the Union's side. That is one of the earlier examples on this coast of an industrywide contract, which has now become common. That labor contract, being uniform and binding equally upon all the port associations, led to this need for having common interpretation and clearance of understanding between the ports and coordination of activities.

Q. Now, following the 1934 Award that you have referred to establishing one coastwide contract with

(Testimony of F. P. Foisie.)

longshoremen, was there any committee formed in connection with that contract other than you as a coordinator?

A. There was a coast committee with representatives from the several port associations, which in time, particularly, in the 1936 and 1937 strike, met in San Francisco with representatives of the several port associations for determination of a common program and common policy.

Q. Now, when was the plaintiff Association formed?

A. At a meeting in June, 1937, lasting the better part of a week, at which representatives were present from the several port association, and they left a committee to work together until the job was done. The representatives of the several port associations constituted the body that formed this Coast Association.

Q. And was it that body that prepared and adopted the Articles and By-Laws which are in evidence in this case?

A. It was. There has been, I think, a slight change or, at most, two technical changes, I think I recall, but otherwise the document is the same.

Q. Who participated in the formation? What individuals participated in the formation of this Association from Seattle?

A. Mr. Middleton, who is present now, Senator W. C. Dawson, and Mr. Joseph Weber of Griffiths and Sprague.

Q. You referred to Mr. Joseph Weber of Grif-

(Testimony of F. P. Foisie.)

fiths and Sprague. Did you know him during his lifetime?

A. Intimately, for years.

Q. When did you first become acquainted with him?

A. When I first was employed by the Association, on recommendation of President Suzzalo, I was referred,—Mr. Weber was referred to me, and he was the first man on the waterfront I met. He with Captain Jim Gibson had been authorized by the Seattle Association to employ a manger of industrial relations, and I became that person.

Q. And do you know what connection Mr. Weber had with the defendant in this case from the time you first knew him until 1941?

A. I knew that he was the head of the company for all purposes of dealing with labor and with the Association. He met as a trustee always and was exceedingly faithful.

Q. When you say as a trustee, you mean trustee of what?

A. The Seattle Association. He was president; he was a member of the Budget and Finance Committee; and I think also chairman; he was active in accident prevention work; he was one of the leaders of the waterfront throughout the period of his life that I knew him.

Q. Was he likewise one of the leaders in the creation of the Coast Association? [55]

A. From its inception at Lakeside, San Francisco, and immediately upon the incorporation of

(Testimony of F. P. Foisie.)

the organization, one of its directors from the beginning up to the time of his retirement.

Q. Now, will you describe to us the functions which the plaintiff Coast Association performs for its members?

A. Under its Articles of Incorporation, it negotiates the Coast labor contracts and controls labor policies in all associations' and members' labor contracts. Perhaps I should begin by stating that the Association is limited to the labor relations of its members.

Q. May I insert this question, are the several port associations, including the Waterfront Employers of Washington, all associate members of the Coast Association? A. They are.

Q. And have been from the beginning?

A. They have been from the beginning. In addition to negotiating the Coast labor contract, administering it, securing observance under it, the handling of disputes which arise within the terms of the contract, the holding of hearings and arbitration proceedings under it, the development of relations with the governmental departments, particularly throughout the period of the war, in connection with the Coast contract. In addition to that, the Coast Board determines the labor policy on all port labor matters for all port labor contracts, of which there are perhaps 34.

Q. I show you what has been market Plaintiff's Exhibit 34 for identification and request that you please——

(Testimony of F. P. Foisie.)

The Court: What exhibit is that? [56]

Mr. Dobrin: Plaintiff's Exhibit 34 for identification.

Q. And I wish you would explain to the Court what that is.

A. That is the agreement effective December 20, 1940, which is the agreement negotiated at that time but which had its origin in the National Longshoremen's Board original award of 1934 as it was several times amended in the intervening six years. This is the final agreement which continues at this time, which had its origin in 1934 and which went through a series of successive amendments. I was one of those who negotiated this agreement, and I am its signatory as president of the Association.

Q. Is that agreement in effect today?

A. It is, although notice of desire to amend was given by the Longshoremen's Union within the provisions provided for in the agreement effective September 30, but by an exchange of letters between the Union and our Association, it continues in effect until the National War Labor Board hands down amendments thereto; and those issues are before the National War Labor Board at the present time for decision and award.

Mr. Dobrin: I offer Plaintiff's Exhibit 34 for identification in evidence.

The Court: Did you say National Labor Relations Board?

The Witness: No, National War Labor Board. There is no issue of relationship. We are dealing

(Testimony of F. P. Foisie.)

with one union and have been dealing with that for ten years.

Mr. Dobrin: I offer 34 in evidence.

Mr. Gose: I am not going to make any formal [57] objection, but I think it is proper to observe, if the Court please, that I don't think there is anything in that that is especially material. We have already admitted in an answer to an interrogatory there is such a contract. I don't think the contents add much.

The Court: Exhibit 34 is admitted for what, if anything, it may be worth, there being no objection but an indication by counsel for defendant that he thinks its value is slight.

Mr. Dobrin: And I don't suppose it is necessary when such remarks are made for me to indicate that I don't agree with them.

The Court: No, the fact that you are offering it in evidence is advice to the Court that you think it is material.

(Exhibit 34 admitted in evidence.)

Q. Now, Mr. Foisie, you referred to other labor contracts other than the contract exemplified by Exhibit 34. Will you just tell the Court more in detail what other labor contracts the Coast Association is interested in and what it does about them.

A. The field of authority delegated to the Coast Association by the port associations in the meeting of its representatives to organize the Coast Association was all port labor relations. Because of the inter-dependence of both the members between one

(Testimony of F. P. Foisie.)

another and the members within a port on common labor problems, that is particularly necessary. It was so deemed by the members as a result of many years experience. Due to the interchangeable nature of the employment of port labor, which unlike many other industries, is not steady for the most part with one [58] employer and a definite employee, but the same port labor worker is likely to work for all the employers in the port. Now, the kinds of port labor so employed are longshoremen, who stow the great bulk of the cargo, ship clerks or checkers as they are called, and dock workers,—

The Court: Just a minute. Longshoremen, port checkers—

The Witness (Interposing): Ship clerks or checkers and dock workers,—

Mr. Dobrin: Mark this please.

(Chart of port labor agreements and parties thereto in United States Pacific Coast ports divided into four districts, was marked Plaintiff's Exhibit No. 35 for identification.)

A. (Resuming): —gear men, watchmen, walking bosses or foremen, and some miscellaneous groups of workers varying in the several ports.

Q. Mr. Foisie, I show you what has been marked Plaintiff's Exhibit 35 for identification and ask you what that is.

A. This happens to be a chart or list of port labor agreements and parties thereto in the Pacific Coast ports set up by district—

(Testimony of F. P. Foisie.)

The Court (Interposing): What exhibit is that?

The Witness: Exhibit 35.

The Court: That is for identification?

Mr. Dobrin: For identification only.

The Court: Now, Mr. Reporter, will you read his answer so far?

(Answer read.)

The Witness: I am sorry this is in a rather disreputable [59] condition (referring to Plaintiff's Exhibit 35). I just happend to have it in my pocket, and I didn't have a fresh copy, but it served to illustrate the diversity of port labor agreements and interests.

Q. Now, I notice, Mr. Foisie, that this chart has in the lower righthand corner the date March 23, 1938. Does the chart nevertheless illustrate the present condition or does it not?

A. It does with a very slight change.

The Court: That is 1938?

Mr. Dobrin: Yes.

Mr. Gose: I have no objection subject to the same observation I made as to the materiality of Exhibit 34.

The Court: Exhibit 35 is admitted for what it may be worth, counsel having different views on the matter.

(Document previously marked as Plaintiff's Exhibit No. 35 for identification was received in evidence.)

Mr. Dobrin: May it be agreed between us that

(Testimony of F. P. Foisie.)

when our photostatic copies arrive I may substitute a photostatic copy and take the original out?

Mr. Gose: Certainly.

Q. Now, Mr. Foisie, refer to Exhibit 35, and will you explain to the Court,—or, first, let me ask you this: that was a record made, a chart made for the period 1938? A. It was.

Q. And does it represent fairly a continuance of that situation down to and including the present time?

A. It does. There are slight changes,—if I had been writing this today, there would be slight corrections, but [60] they would not be significant in any particular.

Q. Now, will you please explain to the Court what functions with reference to those agreements the Coast Association has and is performing.

A. The Coast Association has been likened to labor's Union. It is in effect a Union of employers for the purpose of dealing collectively by the employers with labor collectively. It is in the effort to secure stability that both sides under those objectives make industry-wide or, as they are sometimes called, master contracts. In a smaller scale, that is true of a port labor contract where employers in a particular port, as here, make certain contracts, as for dock work with checkers and the like. It is for the purpose of developing minimum standards, a stable agreement, a cooperative relationship, and at times, where necessary, to strengthen both sides for whatever test of strength

(Testimony of F. P. Foisie.)

as and when it does. It is merely the effort on the part of the employers, largely employing the same workers, to work out the standards in the industry which will bring peace and stability. The interest of the employers arises out of the fact that the workers go from one employer to another. If they worked under different agreements, there would be unending disputes.

Q. Now, will you describe to the Court in connection with those agreements what the Coast Association does in reference to them?

A. Well, even before the Coast Association and ever since, no one port association, by its commitment to the other members of the Coast Association, has wholly offered to [61] make a change in a labor contract without consulting with the other members, just as the Union. It is the Coast Association, by delegation of power of the port associations and by the membership of the individual companies in the Coast Association, that has the final decision on all matters of labor policy, and exercises that frequently.

Q. And that applies to all agreements of all kinds made either by the Coast Association, local association or groups of members of local associations?

A. With this modification of your question, the answer would be yes; at times, where there is no common interest of the group in a particular segment of port labor, the port association has not exercised the control which it has and could; but

(Testimony of F. P. Foisie.)

believing in as much freedom as possible wherever it can be secured without injury to the larger group, it doesn't exercise it. It didn't in the beginning in the case of a foremen's union here; it has since.

Q. Does this exhibit illustrate those agreements in which the Coast Association has considered it a part of its function to supervise the agreements?

A. It does.

Q. Now, what does the Coast Association do for the purpose of making such a contract as has been offered in evidence here as Exhibit 34? What are the functions it performs? Who acts and what do you do?

A. In local agreements local committees of interested employers are either appointed by the local associations, or for the purpose of considering their proposals and for the purpose of considering union proposals, those matters are cleared [62] directly to the ports and the Coast Association.

Q. What do you mean by "cleared"?

A. It means the Seattle Committee would clear with the Portland, San Francisco local associations, the Southern California and the Coast Association. It means the comparable bodies in those ports would study the effect of any Association proposal or Union proposal, would advise with the ports and say, "We agree," or "Don't agree," or "We suggest certain changes." If there is a dispute or a difference, the Coast Association directors or eventually the membership would be the deciding voice. We hardly ever get to anything approaching that

(Testimony of F. P. Foisie.)

because, usually, in the exchange of ideas agreement is fairly quickly effected.

Q. Now does the staff of the Coast Association supervise this method of clearance you referred to?

A. We do, most meticulously. When there is an emergency matter, the teletype and telephone are used. When there is occasion for it, thorough preparation of all the facts underlying any situation is prepared. It sometimes involves a development of earnings from various waste material or working conditions; sometimes the examination of a hazard. All of the material is prepared. A committee of practical men then works it over, and then it goes to the larger group. By the time it has reached the larger group, all the formative work is done. By the time we have had the benefit of the experience of the men in the several ports, we are pretty much of a mind because the interests are common.

Q. But that work of assembling opinions and assembling information [63] from the various local associations and its members is done by the staff of the Coast Association?

A. Yes, it is done by myself and a few workers close to me.

Q. Now, do direct representatives of the Coast Association likewise participate in the actual negotiations of these local agreements with the Union?

A. The members of the Coast Association, as members of that and as members of the local asso-

(Testimony of F. P. Foisie.)

ciation, participate, yes. Sometimes the association joins. Sometimes counsel joins. Sometimes there may be a meeting on grave matters of representatives coming from a port to confer with the Coast Association directors. And always that occurs at the time of the quarterly meetings, which are fixed and regular as routine.

Q. Now, we have discussed procedure at to agreements other than the Coast longshoremen's agreement. Just describe to me how the negotiations with reference to the Coast longshore agreement are carried on and by whom.

A. When the time approaches for the consideration of changes in the Coast agreement——

Q. (Interposing) Well, I don't want you to,— I want you to explain from the beginning as to what you have done and how you do it at the present time in a general way.

A. Beginning with the last agreement?

Q. Beginning with the last agreement? No, the one following the president's Board's Award.

A. Beginning with the 1934 settlement of the strike by agreement to arbitrate, the president's National Longshoremen's Board met for several weeks in San Francisco, and then it met in each of the major ports, Portland, Seattle and [64] finally Los Angeles or San Pedro. Open hearings were held. Witnesses from the Union and from the local port associations were present and gave testimony. The staffs of the several port associations developed the factual material. I happened

(Testimony of F. P. Foisie.)

to have been serving as sort of a predecessor to myself in a Coast coordinating way. I covered all the ports except down South, and went along for the preparation of the material. The result of that arbitration was based on the facts developed by the Waterfront Employers, the individual employers and the Association's representatives in all of the ports. It resulted in the Coast agreement. In 1936 there was a strike and settlement, and at that settlement there were representatives of all the port associations present in San Francisco. After the 1936-37 agreement was signed, there were certain supplemental subjects involving a great amount of detail work.

Q. If I may interrupt, that would be the beginning of the services of the plaintiff in this case?

A. That is correct. The strike was settled February 4, 1937. The plans for the Coast Association were developed shortly thereafter. They were concluded in June. There were committees from the several ports that met not only on that but at other times to determine phases of the master agreement. From that point on, all Coast agreement changes have been considered carefully by all the port associations, and at all times when there was a major change impending, representatives were called in, stevedore and terminal men, from all the ports of the group. That was also true of all major arbitration. [65]

Q. Now, from that time on, that is, 1937, since the formation of the Coast Association, the Coast-

(Testimony of F. P. Foisie.)

wise longshore agreement has been negotiated and concluded by the Coast Association, is that correct?

A. That is correct.

Q. Now, what does that involve in the way of effort?

A. Well, more than I like to look back upon. For example, in the last hearings before the War Labor Board, with a special panel set out from Washington, we had six weeks of intense preparation, two weeks of hearings, with representatives from the several port associations present throughout the two weeks hearings and for the preliminary few days in advance. Thereafter there occurred the development of a 260-page printed brief and factual statement for the industry of the many issues involved. There has since been a trip to Washington involved in this and now a hearing before the War Labor Board is impending before the award is handed down.

Q. Mr. Foisie, there is nothing unique about this particular experience that you just had in connection with the War Labor Board?

A. There is not.

Q. I wish you would describe just generally the labor problem dealt with by the Coast Association in connection with this Coast agreement.

A. Well——

Q. You can recall many circumstances identical with that or substantially so.

A. We had representatives from the port associations for six weeks, two from each, in San Fran-

(Testimony of F. P. Foisie.)

cisco throughout January [66] and February and part of March,—the latter part of January and the early part of March, in negotiation with Union representatives from the several ports, attempting to work out more nearly uniform working and dispatching rules. Those are the rules which implement the master agreement.

Q. You are speaking about 1943?

A. 1940. In all arbitration such as in 1942 on we had representatives of the port associations present for a period during preparation, during the period of arbitration, which lasted some two or three weeks, sometimes thereafter, to clean up the chores. Any one of these agreements, based as they must be on statistical studies of factual material involved a great preparation and not always limited to the Coast staff. Many times the port managers are draw in, and sometimes some of the practical men lend their laboring oar. No labor contract is as simple as it appears in our experience.

Q. Now, referring to the Coast longshore agreement,—once you have arrived at the agreement, is that the end of service which the Coast Association performs in connection with it?

A. No. First—and we have had no change in the Coast agreement since 1920—we have had two awards——

Q. You say 1920?

A. 1940. Excuse me. But at that time we had to submit the agreement to the entire membership for ratification. Once the ratification sets in—the

(Testimony of F. P. Foisie.)

Union ratifies it also—we then have the problem of administering the Coast agreement. There is the duty of handling grievances and [67] routine matters such as the registering of men. There are all the issues which have to do during the war with the war functions of recruitment and training and feeding and housing. There are a whole series of dispute procedures which inevitably attach to an industry which covers 15,000 men in 24 ports for nearly 200 companies and 60 local unions. The matter, although essentially simple, inevitably takes on a good deal of detail and means a great many chores, not all of them centralized.

The Court: Mr. Reporter, will you read that answer.

(Answer read.)

Q. Mr. Foisie, under the Coast agreement, what provision is made for hiring halls?

A. There is a provision which requires a single hiring hall unless the Union and the employers get together in any port for branch hiring halls, in all the major ports except Tacoma and in such minor ports as the Union and the Association may desire.

Q. How many hiring halls are now maintained?

A. Even during war conditions, out of about 24 ports there are, as I recall them, about six in Washington and about fifteen on the Coast.

The Court: That is, the 15 includes Washington?

The Witness: Yes.

(Testimony of F. P. Foisie.)

The Court: Nine more than the six?

The Witness: Yes, that is correct. That is because the distribution of ports appear on a large scale——

Q. (Interposing) You mean there is a total of 15 on the Coast? [68]

A. Fifteen hiring halls under the Coast agreement; there are other hiring halls under other agreements.

Q. Six of which are in the Washington area?

A. Six, except for Tacoma, which is separate under a separate agreement.

Q. Now, what does the longshore agreement require with reference to the expense of these hiring halls?

A. A joint sharing of expense by the Union and the Association.

Q. And when you speak about the Association you are speaking about the Coast Association?

A. Yes; the Coast Association and the Union both.

Q. By the plaintiff in this case and the Union?

A. That is correct.

Q. Each bears one-half of the expense?

A. Exactly one-half.

Q. Is there such a hiring hall in Seattle?

A. There is, sir.

Q. What is the difference between the hiring hall in Seattle and the one in Tacoma?

A. Well, the Union in Tacoma, the I L A, operates the hiring hall, pays for it entirely, and merely

(Testimony of F. P. Foisie.)

agrees with the Employers on the dispatching rules that are to be set up.

Q. In other words, the Union there has elected to maintain its own hiring hall at its own expense?

A. It is a Union hiring hall as against what we commonly call a joint hiring hall.

Q. Now, in the administration of the Coast Agreement, is there a system of committees which function in its administration? [69]

A. Under the Coast agreement there is a joint local labor relations committee for each port, set up under the Coast agreement but by the local union and the local employers association obligated to administer the contract as a part of the Coast contract; and that joint labor relations committee in all ports has regular meeting dates——

Q. (Interposing) Now does that labor relations committee in these several ports manage the hiring hall?

A. It does, and handles grievances and handles matters of recruiting more men, registering men and the like; and it settles disputes. One of its largest activities—at least, one of its most difficult ones is the adjudication of disputes. If those disputes are not settled locally by joint settlement and joint signature, the facts are submitted to the Coast Joint Labor Relations Committee, consisting equally of members of the Union and the Coast Association. If we in the Coast Association can't settle it, it goes to an arbitrator.

Q. Now, will you please tell us over the period

(Testimony of F. P. Foisie.)

that this contract has been in effect what number, if any, of issues have arisen which have been disposed of by local committees without going to the Coast Committee and then to arbitration?

A. I can't say exactly. I know most disputes are settled by agreement locally. Of the disputes which have come to the Coast Committee, only a portion have been settled because by that time the conditions are pronounced, and we have had over 200 arbitrations under the Coast authority where arbitrators presided as in a sense this court presides, where counsel for the Union and the Association [70] conduct the hearings, where a court record is made, where a written award is handed down, which award becomes a part of the longshore contract.

Q. In addition to the type of arbitration provided for in the longshore agreement itself, has the administration of the Coast agreement resulted in other types of arbitration?

A. I am not sure of your question unless it refers to the war——

Q. (Interposing) That is what I am referring to.

A. War Shipping Administrator Admiral Land set up as part of the War Shipping Administration a particular war labor body devoted to the Pacific Coast cargo handling called the Pacific Coast Maritime Industry Board.

Q. And have matters been required to be submitted to that Board by the Coast Association in

(Testimony of F. P. Foisie.)

connection with the longshore agreement and other agreements?

A. Many; and the Union likewise.

Q. And when you say many, can you give us any rough estimate of the number?

A. We have met probably on the average of once a week for two and a half years; sometimes two and three times a week. Probably the average would be once a week at least. We have at all times the authority to increase wages or hours. We have had some difficult adjustments which required formal records and elaborate hearings in about perhaps 30 cases in two and a half years.

Q. Now, what does the staff of the plaintiff in this case which performs these function that you have described consist of? [71]

A. The Coast Association staff consists of myself as president; of Mr. Boyd, the Secretary-treasurer, who is here, of the Coast Association; of Mr. Robertson, an experienced research man; of two persons who serve in a statistical capacity; of counsel, not merely one man but a staff available at times employed as counsel. At times I have help secured from the ports' staff. That would describe probably the working staff.

Q. Now, you have described the staff of the Coast Association as it exists at its headquarters?

A. Yes.

Q. And those headquarters are maintained in the offices in San Francisco? A. They are.

Q. I assume, of course, in addition to what you

(Testimony of F. P. Foisie.)

have described you also have adequate stenographic help?

A. Oh, yes, all of the necessary personnel.

Q. And other clerical assistance?

A. That is right. I thought your question was directed to the work of the Coast Association in connection with the Pacific Coast Maritime Industry Board.

Q. No, I am speaking generally, and so if your answer is not as complete as you would have made it, complete it.

A. Of course, all the port associations are staffed on the Coast Association budget. Those staffs are responsible to me on policy matters; they are responsible to their trustees on administrative matters and in certain functions performed locally. Whenever there are labor disputes in any port, they are the persons, the manager and his assistants, his office assistants—they are the persons who must [72] begin to handle the disputes, develop the detail, present the records, whether it be in local hearings or to us in San Francisco to be handled through the Coast machinery.

Q. Well, is there a staff of the Coast Association located in Seattle?

A. Oh, yes.

Q. And on the payroll of the Coast Association?

A. That is correct.

Q. What does it consist of?

A. The manager, in this instance in Seattle, a vice-president of the Association, receives part of

(Testimony of F. P. Foisie.)

his salary from the Coast Association, the major part of it.

Q. You mean as vice-president of the Coast Association?

A. Exactly; the manager of the local association, his assistant, another assistant stationed in Tacoma. That is the major executive staff.

Q. And does the Coast Association maintain and pay for an office in Seattle?

A. Oh, yes. We have other activities not on the labor side in Seattle as well, accident prevention and the like.

Q. We will come to that. But for the purpose of housing the staff of the Coast Association, Seattle offices are maintained? A. Yes.

Q. Are those offices shares with the Waterfront Employers of Washington?

A. To the extent that the Waterfront Employers of Washington carry on central pay service for the members' longshoremen who work interchangeably for the employers, and to the extent that the local association renders service to its [73] members in the way of collective reporting, in withholding income, social security and other forms of activities, those activities are locally financed and locally controlled. All other services are Coast in function and Coast in cost.

Q. Does the Coast Association maintain similar offices in Portland, San Francisco and San Pedro?

A. Yes.

Q. You referred to the Pacific Coast Maritime

(Testimony of F. P. Foisie.)

Industry Board and will you tell the Court what the membership of that Board consists of, who are the members?

A. Six persons constitute the Board with certain alternates: two representatives of the public, two representatives of our Coast Association, two representatives of the District Union; all six appointed by the administrator, but the Union and ourselves nominate for the consideration of the War Shipping Administrator the persons which he has in all instances thus far named. In addition, alternates are appointed, two from the Union and two from the Employers. Mr. Middleton is an alternate who is here. In addition, in all matters concerning the International Longshoremen's Association at Tacoma, Anacortes and Port Angeles, where they are concerned, there are two alternates appointed from that union, and two International Longshoremen and Warehousemen's Union representatives drop out.

Q. Do you act as a member?

A. Yes.

Q. I think you have pretty well described that organization, but it was not directly described, and I wish you would [74] tell us what the functions of that organization are.

Mr. Gose: What is that?

Mr. Dobrin: The Pacific Coast Maritime Industry Board.

A. That is a creature of the War Shipping Ad-

(Testimony of F. P. Foisie.)

ministrator, appointed under the executive authority granted——

The Court: (Interposing) That is the War Shipping Administrator?

The Witness: War Shipping Administrator, Admiral Land.

A. (Resuming) That Board was created largely out of the movement for joint labor-management committees, but in this instance with representatives of the public appointed as well and with certain powers. Its objective was to increase efficiency in cargo handling on the Pacific Coast. It had some rather wide power. Those powers included such a factor as the right to set aside a portion or all of the labor contracts. That has been somewhat circumscribed since. It has developed more and more into a welfare board, a board for the securing of adequate housing, gasoline rationing, feeding, shelter, transportation of men to and from ports that are selected for our members—we procure longshoremen; and such related activities. It has handled at all times disputes and still does.

Q. Disputes which are not otherwise settled under the Coast longshore agreement?

A. That is correct.

Q. Was it created in the interest of the United States Government in the movement of cargoes by the War Shipping Administration [75] for the Army, the Navy and other governmental agencies?

A. Solely for them and under executive authority of the War Powers Act, I believe. In any event,

(Testimony of F. P. Foisie.)

its sole purpose was, following Pearl Harbor, to expedite the movement of cargo, and we are led to entertain the belief that it will be done away with once the war is over.

Q. In addition to the Coast Association furnishing the services of yourself and another member of the Coast Association, does the Coast Association do anything else for this Board?

A. Yes, a good many activities. First, we develop a great deal of statistical data required as to the availability of men, the demand for men. Our member companies do it. It is cleared and tabulated in behalf of the Pacific Coast Maritime Industry Board. Certain matters they are not in position to carry on. Until recently all gasoline ration certification was carried on by the Association. That has just been taken over after two and a half years. The building of shelters has largely been at the request of the Maritime Industry Board. The handling of allocation—that is, the determination of the need and supply of men, not of supply of men, but the balancing of that problem, particularly in districts like the Columbia River and Puget Sound, where you have so many ports and the shifting of ships and where there is a shortage of men, with the Army, Navy and War Shipping Administration determining what ships are hot ships and where men should go—all those vital matters are matters of daily routine and operation by the staff of the Coast Association centered [76] in the local associations.

(Testimony of F. P. Foisie.)

Q. And that information is transmitted through you to this Pacific Coast Maritime Industry Board?

A. Yes.

Q. You used the expression ships that are "hot." What does that mean?

A. Where military necessity indicates that a given ship must leave a berth at a given time to make another berth or go to sea or make some cargo, make a point of loading certain urgent cargo, whatever may be the factors which control the military position in the service of supplying both Army and Navy, and, incidentally, including lend-lease to Russia, Britain and so forth. All those factors, all those phases as far as the supply and the need of men are concerned are developed by the Association and placed in the hands of the authorities.

Q. Are you referring to the Coast Association?

A. Oh, yes.

Q. What activities does the Coast Association have in connection with such Federal agencies as the National Labor Relations Board and the War Labor Board?

A. Under the master contract for the Coast, all matters arising under that within the field of the War Labor Board, any dispute, must be handled by the Coast Association to the War Labor Board, whether it is regional or national, and any action on port labor agreements that likewise arise. We haven't had so much to do with the National Labor Relations Board because we were unionized long before the Wagner Act, but we have had some work,

(Testimony of F. P. Foisie.)

and that has been done entirely by the staff of the Coast Association, even if [77] the issues were local.

Q. What direct contacts and functions has the Coast Association performed for the Army, the Navy, the War Shipping Administration and other government agencies at their request?

A. We have nothing to do with the Army, Navy and War Shipping authorities on contractual matters with stevedores, steamship and terminal companies. Ours is a labor function and is limited to that. Within the labor function we have a great deal to do with them. We have no official connection, but we are relied upon constantly to help. For instance, with regard to the accident prevention activities of the Army Transport Service, it had its first basic data and experience out of the Accident Prevention Bureau of the Association. In the matter of information as to labor agreements and labor conditions and labor practices the Association is consulted constantly. In the matter of prevention of pilferage, we are expected by the Army and Navy and War Shipping to carry the banner in keeping that down, and they have supported us, and we have made some helpful progress in that direction. And, of course, the entire field of reporting possible disputes or actual disputes, the securing of the data as to the cost and best remedy—in that entire field the authorities rely upon the Association because we have the staff for doing it. And because these agreements are almost en-

(Testimony of F. P. Foisie.)

tirely Association agreements, obviously, the answers must come from that source. However, that is purely a cooperative arrangement; we have no contractual relationship.

Q. Now, in connection with these various functions of the [78] Coast Association to which you have made reference who pays the bills?

A. The members pay the bills——

Mr. Gose: Just a minute. Do you mean directly or indirectly? Well, I will take it up on cross examination.

Q. Does the Coast Association pay the expenses for the functions you described?

A. The Coast Association carries the entire cost with the single exception of the service of central pay and collective reporting.

Q. That brings me then to this——

The Court: (Interposing) Service of what?

The Witness: Central pay service and collective reporting. The central pay service was a development by the employers to meet the needs of the longshoremen so that the men who had money coming would not have to run around from one company office to the other. We have gone ahead for a couple of decades, and we pay them centrally so that a man goes to one place, no matter for what employer he works. That is a local function. The second——

Q. Pardon me. I was going to ask you a question in a little different form, and I think you will bring out the same answer. But to make the record

(Testimony of F. P. Foisie.)

clear, what are the functions of the local associations, of which the Waterfront Employers of Washington is one?

A. The two activities or functions as you describe them are central pay service and collective reporting. Then the detailed administration of all agreements is local, but it is at Coast expense. A local board of trustees sits [79] and works, and that board of trustees develops cooperation between the ports. They carry on the work, but the staff is paid by the Coast, and the cost of all the other activities except those two is borne out of Coast tonnage fees.

Q. All right. Now, getting back again to the function of the local associations, you spoke of collective reporting and central pay office?

A. Yes.

Q. Now, the central pay office is a function, as I understand it, Mr. Foisie, that the local association takes over for the individual employers of longshoremen?

A. That is correct.

Q. In other words, they pay the men with money furnished by the employer?

A. That is right.

Q. And what is this collective reporting that you are talking about?

A. If I weren't in a court, I would say it is a headache. Actually, it is a service rendered of a highly technical sort for all members of the Association under the several governmental requirements centering in the treasury department and relating to social security legislation; the withhold-

(Testimony of F. P. Foisie.)

ing tax; the reporting of combined earnings because, while the earnings of any one longshoreman from any one employer would not be substantial, the accumulation of those earnings becomes a valuable record; the withholding of taxes; the paying of the victory tax when that was present; the deduction of unemployment insurance; the payments by the individual longshoremen in some ports, [80] not here—I mean by employers of the premium required by law for old age benefits. All those are activities which vary some in the different port associations.

Q. I wish you would discriminate when you use the term “association”. You are now speaking solely about local associations?

A. Local associations. San Francisco is an association for all practical purposes the same as Seattle, Portland and San Pedro. The Coast Association is detached from the San Francisco local association just as much as it is detached from this in that these functions are carried on separately.

Q. Would it be fair to say that whereas each employer of a longshoreman would have to issue a check and make such reports for tax purposes under Federal and State agencies, the local association for the group of employers performs that service so that the longshoremen gets paid at a single place and does not have to go to several employers?

A. Due to the peculiar nature of employment and the interchangeable nature of employment of

(Testimony of F. P. Foisie.)

longshoremen, coupled with the fact that the members have developed cooperative relations among themselves for years in dealing with labor, certain of our functions or services are performed in this field which are not common to waterfront employers anywhere else in the country; but they are common throughout the Pacific Coast. First, the longshoreman gets all his money at one spot, an association office. He is not employed by the Association, but he gets all his earnings from the employers at one spot. Second, certain functions in reporting to the government are rendered by the [81] Association for its members. By carefully drawn and completely effective agreements, government bodies are served as well as the members are served and the longshoremen are served by having this collective effort.

Q. Now, those two things are the functions of the local association? A. Yes.

Q. And do the local associations carry on those functions at the local association's expense?

A. Entirely.

Q. How is that expense collected?

A. From the employers of longshoremen by a percentage of the payroll determined by the local association trustees.

Q. During the course of your testimony you have referred to the Accident Prevention Committee or Bureau, rather?

A. That is correct.

Q. Tell the Court what that is.

A. That is an organized accident prevention

(Testimony of F. P. Foisie.)

activity of the Coast Association which had its origin before the Coast Association in 1927, which has continued its existence ever since and which has become a part of the Coast Association expense and under control of the Coast Association itself. The Bureau has a staff of resident engineers in each of the major ports, three in Seattle, one in Portland, four in San Francisco and three in San Pedro under the direction of a Chief Safety Engineer, an assistant and likewise office staff in all ports. The budget runs \$80,000 last year, \$100,000 next year. Every effort is made by the Bureau staff through committees of employers called Accident Prevention Committees in the [82] several ports to make available to all the members in each port all the causes of accidents, remedies for accidents, to help carry on training in first aid, to develop a national program, to hold meetings. That has been going on since 1927 and it has become accepted as one of the most valuable services of the Association.

Q. You are speaking now of what association?

A. The Coast Association. I might measure the value by stating that the War Shipping Administration authorities advise that an analysis of costs on this Coast of insurance for longshoremen and harbor workers compensation premiums discloses the average is 8.6. On the East Coast, without this effort, it is 15% of the payroll. So that in that singular particular, without being able to say that the Accident Prevention Bureau is the cause of

(Testimony of F. P. Foisie.)

all of that—we know it is not but it is unquestionably accepted as a significant factor. Some of the companies even succeeded in getting a rate below 8.6.

Q. Does the service of the Accident Prevention Bureau result in any financial saving to members of the Coast Association?

A. To the extent——

Mr. Gose: (Interposing) Just a minute. If the Court please, I wish to object to this line of testimony. I think it is calculated to show some reasonable value of the benefit of these services to the plaintiff. May I inquire as to whether that is the purpose?

Mr. Dobrin: The purpose is to show what services were performed for our members, what value it has, certainly.

Mr. Gose: If it is calculated for the purpose of [83] claiming liability on the theory of quantum meruit, I shall interpose an objection to all this line of testimony.

The Court: All right. You may have an objection to all of this and an exception to the Court's overruling your objection. The witness may answer.

Mr. Dobrin: Read the question.

(Question read.)

A. Because the Association does not enter beyond the labor field into the contractual relations of its members either in making stevedore or terminal or other contracts or the buying of insurance, we can only rely upon the evidence voluntarily

(Testimony of F. P. Foisie.)

given to us by our member companies. We know our members enjoy a premium rate for their compensation insurance not much more than half what their associates on the East Coast have. The economies are marked and are accepted as standard; and as a full justification for the value of the compensation to its membership, it is recorded in our minutes throughout by voluntary expression of members.

Q. Now, in connection with the accident prevention work, what is the purpose of the Coast Association going into that field?

A. Because it is a vital phase of labor relations. It is considered to be directly related to labor relationship. Where you have safe working conditions, your men are for you. Where they are hazardous, they are against you, and they should be. The only cause, the one justifiable cause under our Coast labor contract which fully justifies the stoppage of work, and the only one in which the men have been upheld when they have exercised it—— [84]

Mr. Gose: Just a minute. While still preserving my precious objection, I would like to object from still another point, and that is all these theories are pure hearsay and conclusions on his part. The inquiry does not justify a speech. I think the witness should be directed to answer the questions on the basis of his own information and not the basis of conclusions and hearsay.

The Court: I am rather doubtful of this last answer.

(Testimony of F. P. Foisie.)

The Witness: Well, sir, I can get the contract. The labor agreement has it right in it. All I have said is there in so many words.

Q. It is in the labor contract?

A. I am not stating a judgment of my own. I will get it if you will look at it.

Mr. Gose: I wish the witness would confine himself to answering with statements of fact. Every question has been responded to with an oration of a sort.

Mr. Dobrin: Well, I don't think that is correct. It is not necessary to say those things.

The Court: I will say that it would seem to me that this last statement was the expression of a theory. The witness, however, says it is embodied in the labor contract. I will let him answer, and you have the privilege of cross examination.

The Witness: May I read the contract sir?

Mr. Dobrin: No, it will not be necessary.

Q. Finish your answer.

A. How far did I get?

(Question read.) [85]

A. (Resuming) I think I should have said if I did not say when the men have exercised it, they have been upheld. It is required that the employer must provide a safe working place, and if it is not provided, the men are to stop work. I am not sure I have made it coherent in there.

Q. I think it is now. When an issue such as that arises on the job, who comes there to dispose of it?

(Testimony of F. P. Foisie.)

A. The manager of the local association and the Chief—the Accident Prevention Engineer in charge in that area goes to the job. If the situation is risky, work stops until some adaptation is made.

Mr. Gose: Just a minute. That is the very sort of thing I objected to. The question was, “Who goes?” He answered it. Now we start to enlarge on it.

Mr. Dobrin: All right.

Q. What does he do when he gets there?

A. The Accident Prevention Engineer——

Mr. Gose: I want the witness to answer the question.

The Court: Well, I will say that Mr. Gose’s objection is well founded. The witness answers the question and then proceeds to——

Mr. Dobrin: He anticipates the next question.

The Court: He answers what he assumes will be your next question, which might not be. All right.

A. (Resuming) The Accident Engineer goes down to the job and inspects it.

Q. And what does he do, if anything, if he is not satisfied with the conditions that the particular employer may have [86] in effect there?

A. If in his judgment and as a result of his experience he finds there is a justifiable cause for complaint or knows a way of avoiding the cause of a complaint, he goes to the employer concerned—in this case the walking boss—and says, “Please change this operation in such and such a manner

(Testimony of F. P. Foisie.)

to make this foolproof." I think I may say it because I am responsible for the protection of these men though not immediately so.

The Court: Well, it is now 4:30. I will adjourn this case in a few minutes until tomorrow morning. I have a question of counsel. Having had the benefit of this day's work, what do you think of your prediction this morning of two days?

Mr. Dobrin: I haven't changed my prediction.

The Court: In other words, up to now the case has taken no longer than you expected?

Mr. Dobrin: No, and I have put in, I think, the majority of the material that the other side would want to put in.

The Court: What do you think, Mr. Gose?

Mr. Gose: Counsel has taken a little longer than I anticipated when I made my prediction, but as this is his only witness I would think that we could still get through in two days.

Mr. Dobrin: I have one witness on a couple of these exhibits in case you don't admit them.

The Court: Counsel, tomorrow evening, when, I imagine, if this case is not finished, this case will be adjourned until Tuesday morning. I am in Yakima on [87] Saturday. I have no cases now set for trial Tuesday. The matters which were set for trial have been continued. I am not inviting you to go over until Tuesday because I have a number of matters for consideration that I hope to do more than just consider; I hope to decide them.

But if you do not finish by tomorrow, the Court will be open for you Tuesday morning.

Mr. Dobrin: Mr. Long tells me we will be here Tuesday.

The Court: The Court will be open for you Tuesday morning at 10:00 o'clock. I am not inviting you to continue that long, but I wish counsel on both sides to know that I don't wish either of you to jeopardize any position of yours or any rights of your client by attempting to hurry this for the Court's assistance.

(Whereupon at 4:35 p.m., a recess herein was had to 10:00 a.m., March 23, 1945.) [88]

Seattle, Washington, March 23, 1945; 10:00 a. m.

(All parties present as before.)

The Court: Are the parties ready at this time?

Mr. Dobrin: Yes, your Honor.

The Court: All right: The witness Foisie may be recalled to the stand.

F. P. FOISIE

resumed the stand and testified further as follow:

Direct Examination (Resumed)

By Mr. Dobrin:

Q. Does the Accident Prevention Bureau perform any specific service in connection with the equipment used by longshoremen?

A. Yes, indeed.

(Testimony of F. P. Foisie.)

Q. And what is that?

A. All services arising out of experience which indicates what is safe equipment and what is unsafe and how to make unsafe equipment safe.

Q. Does the Bureau do anything relative to the use of shoes? A. Yes.

Q. What is that?

A. It aided in securing, in effecting arrangements with the shoe dealers and manufacturers to procure a highly approved type of safety shoe, and effected arrangements with the rationing authorities in cooperation with the government to provide a supply of such shoes to be made available to [89] the longshoremen and encouraged them to buy them and use them.

Q. Does the Accident Prevention Bureau carry on an education program among the longshoremen in safety matters? A. It does.

Q. And what is the nature of that program?

A. Varied. It extends from training large numbers of longshoremen in first aid to holding dinner meetings and other meetings with walking bosses for the discussion of safety problems; the setting up in most of the congregating places of longshoremen of poster service. Meetings are arranged with employers for the purpose of discussing and debating safety measures. Special consulting service is given to employers who want intensive consideration given to their respective operations. And the service is available to the governmental authorities interested in accident prevention.

(Testimony of F. P. Foisie.)

Q. You referred to a poster service. What is that?

A. What I think ordinarily is understood as display posters, changed weekly, placed upon standard bulletin boards, kept alive and current and placed at positions where large numbers of long-shoremen will see them.

Q. And what is the nature of the information transmitted by these posters?

A. Sometimes cartoons attempting to point the moral, and by humor through caricatures. Sometimes appeals to self interest in preventing accidents so that a man is able to take care of his family obligations. Sometimes these days the posters contain a patriotic appeal with art work; sometimes a slogan; the customary educational poster work. [90]

Q. Does the Coast Association furnish safety kits?

A. To its own staff. The companies do that for their own walking bosses.

Q. And has the Accident Prevention Bureau also established a code of safe practices?

A. Yes.

Q. And what is the nature of that code?

A. It is a publication given wide distribution, first adopted as a voluntary accident prevention measure by employers up and down the coast through their respective associations. It was first adopted in 1932 I think. It may have been earlier. It was not later. It has been slightly amended since. It has been republished. It is a compila-

(Testimony of F. P. Foisie.)

tion of safe practices for management and for men resulting from the experience drawn from actual accidents as to how to prevent them.

Q. In connection with the war effort, what use has been made of that safety code in the services for accident prevention by the Army, Navy, War Shipping Administration and other agencies?

A. There is close liaison between the Accident Prevention Bureau and the three governmental services mentioned. All three call upon the experience of the Association's staff and committees and, particularly, the Chief Safety Engineers in each of the areas as well as San Francisco. When a special problem arises calling for extraordinary care, for example, such as the handling of explosives, our men have been called in, and they have made careful studies and placed those before the authorities for such action as they wish to take. And they have quite frequently [91] adopted them in big or in substantial part. The training of engineers as well as enlisted men and officers of the Army and Navy has gone on at some length under the teaching and direction of our experienced safety men.

Q. You referred in your testimony yesterday to the local labor relations committee created by the Coast agreement. Who directs the activity of the local Labor Relations Committee in the Port of Seattle?

A. For the employers, the manager.

Q. And that is a member of the staff of the Coast Association?

A. He is.

(Testimony of F. P. Foisie.)

Q. And do the members of the Coast Association who serve on the Labor Relations Committee receive any compensation?

A. The members who are employers receive no compensation from the Coast Association.

Q. How often does this Labor Relations Committee meet?

A. Quite regularly; once a week, occasionally twice a week, and I think here for months past quite always twice a week.

Q. And does the staff member of the Coast Association keep the minutes of those meetings?

A. He does.

Q. And directs its activities? A. He does.

Q. And does he report the doings of the local Labor Relations Committee to the central office of the Coast Association? A. He does.

Q. And does the Coast Association follow the Labor Relations Committee meetings in each of the several ports? A. It does. [92]

Q. And what, if anything, does the staff of the Coast Association headquarters do with reference to these minutes?

A. First, it attempts to absorb the experience of all the ports; then to see that it is interchanged between the ports; then to offer advice on matters which are coming up for consideration which have not been finally disposed of. And always when there is a matter of Coast policy involved, to be certain that it conforms or that the manager is directed in the premises what to do.

(Testimony of F. P. Foisie.)

Q. Does the Labor Relations Committee in each port supervise the dispatchers in the hiring halls?

A. The Joint Labor Relations Committee does.

Q. And when you refer to the Joint Labor Relations Committee, you are referring to the full committee consisting of three employer representatives and three Union representatives?

A. Yes.

Q. In the Port of Seattle of what does the executive staff of the hiring hall consist?

A. A chief dispatcher, three assistants, a clerk, one of the dispatchers, I think, doing both duties; two janitors.

Q. And is the expense of that staff borne jointly by the Coast Association and the Union?

A. Equally, yes.

Q. Equally?

A. Yes, with the Union.

Q. Now, will you explain to the Court the process whereby men are obtained from the jointly maintained hiring hall by members of the Coast Association? [93]

A. Because there is almost no commercial cargo, the ordering of gangs is confined almost entirely to Army, Navy and War Shipping services. War Shipping embraces all of the lend-lease activities, British, Russian, Dutch and so forth. When the government services instruct their contracting stevedores what work is to be done on which jobs and where and the type of cargoes to be handled and all of the other arrangements, the contracting steve-

(Testimony of F. P. Foisie.)

dore members of the Association either report to or are telephoned by the Association's assistant to the manager, who handles the allocation of gangs. If there is to be no shortage of gangs, then the order is placed by the several services with their contractors, and is then relayed to the dispatcher. If there is to be a shortage of gangs, then the allocator settles with the three services which are to have priority, and then he notifies the contractors of the revised orders as directed by the government services. If there is to be a shift of gangs between ports, he, the Association staff man, the allocator, advises the parties at interest. Then the employer having placed his orders with the dispatcher receives the gangs as ordered and at the time and place and in the appropriate numbers.

Q. And is that entire system of dispatching and the supervision of that dispatching provided for in the Coast labor agreement and in the actions of the Labor Relations Committee?

A. Rather in the latter. It is not specifically provided in the Coast labor agreement, but it is generally provided for in the obligation and duties of the Joint Labor Relations [94] Committee as set forth in the agreement; and if there is a dispute in any case, it would go to the Coast Labor Relations Committee as provided in the agreement.

Q. Does the same system of dispatching apply in the Port of Tacoma? A. It does.

Q. Will you explain to the Court why the Port

(Testimony of F. P. Foisie.)

of Tacoma's hiring hall is different than the setup in Seattle?

A. First, because the Union, with a long history of responsible conduct, wanted it, wanted the hall other than under joint management. The hall is a Union hall, not joint, by the National Longshoremen's Board.

Q. May I interrupt just a moment? What I wanted you to clarify, if you will, is that or is it not the same union that operates in Seattle?

A. It was the same general union, when the National Longshoremen's Board made its award, but it secured a different affiliation or certification by the National Labor Relations Board in 1938,—1940 I think.

Q. And is a separate contract made with the Union with jurisdiction in Tacoma?

A. There is.

Q. And is that contract supervised and controlled by the Coast Association?

A. It is.

Q. And that contract is,—for the purpose of simplicity, that is an A F of L Union, is it not?

A. It is.

Q. And the Coast agreement is with the CIO Union? A. It is. [95]

Q. What other members are included in the A F of L agreement?

A. Anacortes and Port Angeles.

Q. And are all other ports on the Pacific Coast included in the CIO Coastwide agreement?

(Testimony of F. P. Foisie.)

A. Yes, as far as longshoremen are concerned.

Q. That is what I am referring to. What does the pool of longshoremen in ports consist of in the port of Seattle?

A. The day by day reports of employers indicate the average total available strength of about 2,000 to 2,200 men all inclusive with 84 organized gangs.

Q. And will you explain to the Court just briefly what you refer to as a gang?

A. A gang consists in this port of a hatch tender, who also runs the gang; a double winch driver; two men to sling up at ships side and six men minimum in the hold discharging; with two men added for loading. If the winches are to be driven singly, an additional winch driver is added. We regard ten men as a standard minimum ship gang and twelve for loading; thirteen for single winches. At times additional men are added under particular circumstances.

Q. Do either men or gangs work steadily for the same member of the Coast Association at all times?

A. No.

Q. How do they work?

A. They work as dispatched by the Union dispatcher out of the hall on the basis of low earnings, rotationally as it were.

Q. Then is it fair to say that any individual longshoreman or gang during the course of a year would be working for every [96] member of the Coast Association who does work in any particular port?

(Testimony of F. P. Foisie.)

A. Who does ship loading in that port, yes.

Q. Now, is what you have explained about Seattle and its dispatching system, the method of dispatching men,—is that substantially the same in the other ports? A. It is.

Q. Does the Coast Association perform any function for its members in connection with legislation?

A. Yes.

Q. What function does it perform in that capacity?

A. It studies all legislative measures in the three States of Washington, Oregon and California and such proposed Federal legislation as directly affects our port labor conditions. The Association does not study general proposed labor legislation, but specifically that which is of direct and immediate interest to port labor conditions such as workmen's compensation, accident prevention and the like.

Q. And is this information obtained by the Coast Association circulated to its members?

A. Yes.

Q. And discussed by its members?

A. Yes.

Q. And then, presumably, the staff of the Association takes such action in respect thereto as the members may request? A. As they direct.

Q. Now, does the Coast Association perform any functions for its members specifically in connection with contracts with government agencies in the administration of them? [97]

A. Yes.

(Testimony of F. P. Foisie.)

Q. What does it do?

A. First, we provide the agencies, as they request, with what copies of labor agreements as they may wish. We notify the government agencies of impending or actual labor disputes. We notify them of impending changes in contracts which may add additional expense. The government agencies are frequently represented at our Labor Relations Committee meetings.

Q. I would like to go back to that a moment. At the Labor Relations Committee meetings in the several ports, including Seattle, do representatives of the Army, Navy or War Shipping Administration attend?

A. Frequently; not invariably, but almost always representatives of the Army are present; of the Navy not so often, but still frequently; of War Shipping, they are always represented through staff men of the Pacific Coast Maritime Industry Board. All three services may be said generally to be represented at such Labor Relations Committee meetings.

Q. Is that true both of those meetings in the local ports and those of the Coast Labor Relations Committee?

A. It is true of the local Labor Relations Committee; it happens less often in the Coast Labor Relations Committee meetings.

Q. Do representatives of Army, Navy or War Shipping Administration attend any of the general

(Testimony of F. P. Foisie.)

meetings either of the directors or the membership of the Coast Association?

A. Yes. It isn't routine, but it is quite frequent.

Q. What is the purpose of their attendance? [98]

A. They are vitally interested in what goes on. Their need to be informed and their desire to co-operate and at times to make proposals,—all this arises out of the fact that the contracts are master labor contracts.

Q. Does the Coast Association maintain legal counsel at its head office? A. Yes.

Q. Does it maintain legal counsel in each of the main four ports? A. It does.

Q. All at the expense of the Coast Association?

A. Yes.

Q. I call your attention to this statement appearing in Plaintiff's Exhibit 24, which is Minutes of Meeting of the Board of Trustees of Waterfront Employers of Washington of March 10, 1943 as follows "Discussion of delinquency of Messrs. Griffiths and Sprague and other members of the Association in the matter of tonnage assessments due to the Waterfront Employers Association of the Pacific Coast for work done by them for the U. S. Army and Navy."

Will you state whether or not there are presently in existence any delinquencies other than the defendant in this case?

A. There are two in out ports.

Q. In addition——

A. To Griffiths and Sprague.

(Testimony of F. P. Foisie.)

Mr. Gose: It is understood, of course, that I don't concede a delinquency in any sense, if that is counsel's interpretation.

Mr. Dobrin: It is not my interpretation. It is [99] in the exhibit.

Mr. Gose: But the inclusion of it in the exhibit or the reference is not admitted to be a delinquency by the defendant.

The Court: That is one of the things this lawsuit it about.

Mr. Gose: Exactly.

Mr. Dobrin: The only objection is my assumption. I am reading it out of the exhibit.

The Court: The assumption by one side of a certain condition does not require the other side to disclaim it during the trial of a case.

Q. When you refer to out ports, do you mean a smaller port? A. Yes.

Q. Now, I call your attention to the following paragraph appearing in Exhibit 24, "Members of the San Francisco Committee next spoke reciting negotiations and meetings held in other ports, explained the situation in San Francisco; the particular arrangement with the U. S. Army there which does not involve contracting stevedores——"

Will you please state whether or not that condition still exists? A. Yes.

Q. I don't think you heard this. Let me read it again. A. All right.

Q. I call your attention to the statement appearing in Exhibit 24 as follows: "Members of the San

(Testimony of F. P. Foisie.)

Francisco Committee next spoke reciting negotiations and meetings held in other ports, explained the situation in San Francisco; the particular arrangement with the U. S. Army [100] there which does not involve contracting stevedores"— Has there been any change in that situation since March 10, 1943?

A. The direct employment of longshoremen by the Army continues in San Francisco, and it is that to which I had reference. Since the date of that meeting the Army has contracted its work out for something more than a year and a half now. Effective April 1 the Army has contracted out its work to Mr. Pierce as part of a program of giving up the direct employment of longshoremen.

The Court: This is in San Francisco?

The Witness: Yes.

Q. This is a little out of order in the testimony, but I am not certain if you testified as to whether or not the Coast Association maintains a staff in Tacoma. A. It does.

Q. And what does that consist of?

A. It consists of a branch manager responsible to the Seattle manager and whatever clerical services may be needed to carry on the Coast work other than central pay service.

Q. And does that branch manager on the Labor Relations Committee at Tacoma perform the same service that the manager at Seattle does?

A. Yes.

Q. Could it be stated generally that with the

(Testimony of F. P. Foisie.)

exception of the fact that the hiring hall at Tacoma is not maintained at joint expense, the situation in Tacoma is identical to that in Seattle?

A. .Yes. [101]

Mr. Gose: With respect to the conduct of the hiring hall.

Mr. Dobrin: That is correct.

The Witness: Yes.

Q. I call your attention to Plaintiff's Exhibit 11 relative to the Coast Association's non-member assessment of 4c per man hour, and I wish you would explain to the Court what that is and what its purpose is and the reason for adopting it.

A. The man hour assessment for non-member companies is for the purpose of charging those who do not pay assessments otherwise into the Association for the services they receive when they get men from the dispatching hall as though they were members. There is a slight difference in such non-member service; they come after the members in the matter of the supply of men. The rate is charged on a reasonably equitable basis and was raised from 3c to 4c at the request of the stevedore members of the Association.

Q. Is the purpose of that profit or reimbursement? A. Reimbursement.

Q. Has that man hour charge against non-members always existed from the beginning of the Association?

A. Yes; at least, when I say that, in Seattle it went back before 1934.

(Testimony of F. P. Foisie.)

Q. Well, you mean even before the Coast Association? A. Yes.

Q. And ever since the Coast Association that charge for non-members using the hiring hall has been in effect? A. In all ports. [102]

Q. How are the Coast Association's activities financed?

A. Out of an assessment of 2½ per ton loaded into or discharged from vessels.

Q. And is that what we are referring to in this case as the tonnage assessment?

A. It is.

Q. And that method of supporting the Association has been in effect from the beginning of the Association? A. It has been.

Q. Now, prior to the Coast Association being formed, can you explain to us how the activities of the several local associations were then financed?

A. Always and exclusively out of the membership, but under varying systems in the several ports.

Q. Would you describe those varying systems?

A. Beginning with Seattle, and when we say Seattle that includes the satellite ports including Tacoma, the expenses were met out of a twofold system of assessment: A tonnage assessment against the steamship companies and payroll percentage against the direct employers, the contract stevedores and terminal operators, in varying percentages.

In Portland, until the Coast Association, the

(Testimony of F. P. Foisie.)

entire expense of the waterfront employers on the Columbia River——

The Court: (Interposing) You are going a little too fast.

Mr. Dobrin: All right.

A. (Resuming) The entire expense of the waterfront employers on the Columbia River was borne by the contract stevedores on a payroll percentage basis. In San Francisco the expense [103] was borne on a tonnage basis, paid by all of the stevedores and steamship companies.

Q. Now, when you say on a tonnage basis by stevedores and steamship companies, do you mean by the members, whether they were stevedore or steamship company, who loaded or discharged cargo?

A. That is correct.

Q. And at that point may I ask this, do steamship company members of the Coast Association load and discharge cargo?

A. Yes.

Q. After the formation of the Association?

A. Oh, yes. In San Pedro the system was almost entirely one of tonnage assessment, with a very small payroll assessment for the stevedore.

Q. In addition to the tonnage assessment?

A. In addition to the tonnage assessment.

Q. Now, I think you have described how the Coast Association was formed and I now wish to ask you when the Coast Association was formed and the representatives of the several port associations were present, was the method of financing

(Testimony of F. P. Foisie.)

the Coast Association thoroughly and fully discussed? A. It was.

Q. And among those present I think you described Mr. Joseph Weber, the manager of Griffiths and Sprague, the defendant in this case?

A. Yes.

Q. Was he active in the discussions?

A. Very.

Q. And those discussions finally resulted in the adoption of [104] the tonnage assessment method presently provided by the by-laws? A. Yes.

Q. Will you state what the reason was for selecting that method of financing the Coast Association?

A. First, because there is a thorough going realization that there is only one source of revenue for shipping as it affects freight, and that is freight revenues. Whether the freight revenues bear the Association expense directly from the steamship companies or through contract stevedores and steamship companies, that is the only source. It was a form of direct taxation which would be known to all. Second, because a good part of our problem was how to explain to the steamship owner in Australia or Liverpool or London or Naples or anywhere else why there should be varying rates for doing identical services in several ports which to him were contiguous. If he knew what the cost was measured in terms of his tons of cargo, he would know his cost immediately and directly. Third, it was clearly agreed without any difference

(Testimony of F. P. Foisie.)

of opinion that a uniform assessment and a simple assessment was clearly desired. All of those factors entered into it.

Q. And the previous experience of the ports indicated the necessity of that?

A. Oh, yes.

Q. Explain that if you will, please.

A. Almost all of them were companies with headquarters at some one point such as San Francisco or Seattle,—in a few cases Portland or New York or elsewhere, and they needed to have a knowledge of what their billing was, how [105] it would come to them, what would be approvable, how it could be simplified, what the cost would be. All of these were complications, needless complications, where there were the several different systems of assessment. They resolved upon one uniform assessment, and that lead to complete meeting of the minds as to the assessment system being a single method ascertainable from the manifest which the owner always has in front of him, which the stevedore always has in front of him, because it is the basis of his revenue, and which could be clearly understood without any annoyance or uncertainty.

Q. Now, was that method of assessment or did that method of assessment meet with the uniform and unanimous approval of the representatives of the four associations which created the Coast Association?

A. All at Lakeside at this week's meeting were in agreement.

(Testimony of F. P. Foisie.)

Q. Were other methods proposed, examined and discussed? A. Yes.

Q. What were some of the other methods which were proposed, examined and discussed?

A. Several of them, starting at the low spot from the possibility of charging so much per dead-weight ton of ship, which was at once discarded on examination, going up to the proposal of charging on a man hour basis, which was rejected by the stevedores largely on the reasoning that it meant they would have to reveal their labor costs to their steamship companies. A mixture of systems was considered, but, principally, it was an issue of either payroll or man hours or tonnage.

Q. What was that about mixed? [106]

A. Combined systems, that we would have a better way by combining two or three different factors.

Q. Calling your attention again to Plaintiff's Exhibit 24, are you personally acquainted with the appointment of a so-called Seattle Committee with R. C. Clapp, chairman, F. E. Settersten, Sam Stocking and William Semar as members in Seattle?

A. Yes.

Mr. Gose: To avoid confusion, when you refer to Exhibit 24, minutes of March 10, 1943, Mr. Foisie was not present at that meeting, was he?

The Witness: No.

Mr. Dobrin: I didn't ask him if he was.

Mr. Gose: I was trying to clarify the point that he was not.

(Testimony of F. P. Foisie.)

Mr. Dobrin: No, he wasn't present.

Q. Are you acquainted with the correspondence which ensued between the so-called Seattle Committee and the so-called San Francisco committee that was present at that meeting? A. Yes.

Q. Did that correspondence result in a meeting of representatives from San Francisco, from Portland, from Seattle, and other ports at San Francisco on May 26, 1943?

A. Yes, but my memory is that San Pedro, although invited, did not attend. I am not sure of the latter, but I am of all the rest.

Q. I will show you what is marked Plaintiff's Exhibit 32 for identification and ask you if you recognize that as the minutes of the meeting to which I have just made reference?

A. Yes. [107]

Mr. Dobrin: I offer Exhibit 32 in evidence.

Mr. Gose: That is a committee meeting?

Mr. Dobrin: That is right.

Mr. Gose: I don't think it is an official gathering of any kind, but I am happy to have it go in.

The Court: Exhibit 32 offered; no objection; and it is admitted.

(Document previously marked Plaintiff's Exhibit No. 32 for identification was received in evidence.)

Mr. Dobrin: I presume counsel's pleasure or lack of pleasure at the admission of an exhibit is no part of the record.

Q. Did you preside at that meeting, Mr. Foisie?

(Testimony of F. P. Foisie.)

A. I did.

Q. Was Mr. N. J. Weber, Vice-President of the defendant, in attendance at that meeting?

A. Yes.

Q. Did he participate therein? A. Yes.

Q. Referring to the proposal adopted at that meeting for submission to the Coast directors, did Mr. Weber approve that proposal?

A. May I see that proposal please?

Q. Yes, certainly (handing document to witness). A. He did.

Q. I think I asked you if you were the presiding officer at the meeting. A. I was.

Mr. Dobrin: I would like to have your Honor read [108] that exhibit, Exhibit 32.

(Court reads Exhibit 32.)

Q. Was the proposal of May 26, 1943 the written proposal appearing in Plaintiff's Exhibit 32, submitted to the Board of Directors of the Coast Association the following day? A. It was.

Q. I show you what is marked Plaintiff's Exhibit 33 for identification and ask you if that is a copy of the minutes of the Board of Directors meeting of May 27, 1943, at which time the proposal referred to in Plaintiff's Exhibit 32 was submitted?

A. Yes, that is an excerpt from those minutes as it affects that proposal.

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 33.

Mr. Gose: No objection.

The Court: 33 admitted.

(Testimony of F. P. Foisie.)

(Document previously marked Plaintiff's Exhibit No. 33 for identification was received in evidence.)

Q. Calling your attention to that portion of the minutes appearing on Plaintiff's Exhibit 33 referring to out port conditions, I will ask you whether that had to do with questions arising out of methods of contribution to hiring hall expense in certain small ports. A. It did.

Q. And has nothing to do with the situation we are discussing here? A. It does not.

Q. Has that subject been fully settled and disposed of? [109] A. It has been.

Q. Were you subsequently, Mr. Foisie, kept fully advised of the subsequent activities in Seattle in connection with carrying out or attempting to carry out the details of Paragraph 2 of the proposal of May 26, 1943? A. Yes,—

Mr. Gose: Just a minute. Before you answer that—

The Witness: Pardon me.

Mr. Gose: —I rather formed the impression from the phraseology of the question that that is going to call for a hearsay response. There must be somebody connected with the Association who has firsthand knowledge.

The Court: You may read the question.

(Question read.)

The Court: Are you objecting on the ground that it is hearsay?

(Testimony of F. P. Foisie.)

Mr. Gose: Yes.

The Court: Overruled. He may say yes or no.

A. Yes, I was present at some of those subsequent developments.

Q. Well, the answer is yes.

A. Pardon me.

Q. Is that correct?

A. That is correct, sir.

Q. Were you present at a meeting in Seattle on January 5, 1944 when the Seattle Committee made its final report in reference to this subject?

A. I was.

Q. And did the chairman of the committee make such a report? [110]

A. Yes.

Q. And what did he report?

A. That the committee had been unable to make any progress on its own proposal which had been adopted by the Coast Board, and he asked, with the concurrence of the rest of the members of his committee, that that committee be discharged.

Q. Was Mr. Settersten at that meeting?

A. My recollection is that he was not.

Q. Were the other two members?

Mr. Gose: What is the answer?

(Answer read.)

The Witness: I don't remember Mr. Settersten being present.

Q. Do you recall that in addition to the chairman the other two members of the committee, other than Mr. Settersten were present.

(Testimony of F. P. Foisie.)

A. I feel confident that I recall Mr. Stocking being present and I think Mr. Semar was present.

Q. Do you recall that those other two members concurred in the chairman's report and application that the committee be discharged?

A. Yes.

Q. And was the committee discharged?

A. It was.

Q. Was the subject matter of the proposal of May 26, 1943 subsequently again considered by the Board of Directors of the Coast Association?

A. It was.

Q. And was it considered at a meeting of the Board of Directors [111] on February 9, 1944?

A. Yes, my recollection is that it occurred at an annual meeting, which would make it February 9.

Q. What did the Board of Directors do with the proposal?

Mr. Gose: Just a minute. I object to that. The minutes are the best evidence. Is there something on that?

Mr. Dobrin: Oh, there is nothing in it, and I would just as soon introduce the minutes.

Mr. Gose: If I could just see them, I would be very happy to have you read the minutes. I don't want him to get in the position of testifying to a lot of things and later finding out it is either contradicted or omitted.

The Court: We will be at recess for ten minutes.

(Recess.)

Mr. Dobrin: Mark this please.

(Testimony of F. P. Foisie.)

(Excerpts from minutes of Joint Annual Meeting of Boards of Directors on February 9, 1944 marked Plaintiff's Exhibit No. 36 for identification.)

Q. Have you testified that this matter of tonnage assessment was before the Board of Directors on February 9, 1944, and I ask you whether or not Plaintiff's Exhibit 36 for identification are the minutes, a copy of the minutes of that meeting.

A. Yes.

Q. Do those excerpts shown in Plaintiff's Exhibit 36 include other matters?

A. Yes, some out port matters.

Q. I notice that this Exhibit is headed, "Excerpts from [112] Minutes of Joint Annual Meeting of the Board of Directors of the Waterfront Employers Association of the Pacific Coast and the Waterfront Employers Association of California." So that there will be no confusion in the record, how is that accounted for?

A. The California Association now is made up of representatives, directors from San Francisco and from Los Angeles.

Q. The local association?

A. The local association. It is the State of California Association which now combines both ports, but with two distinct branches. Because the members, the directors, from the South were present at the time, we made it a joint meeting because we frequently combined business of the local association and the Coast Association.

(Testimony of F. P. Foisie.)

Q. In other words, a time-saving device?

A. That is all.

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 36.

Mr. Gose: No objection.

The Court: Admitted.

(Document previously marked Plaintiff's Exhibit No. 36 for identification was received in evidence.)

Mr. Dobrin: Before I hand it to your Honor, I would like to ask the witness a few questions about it.

Q. On Page 2 of these minutes, Mr. Foisie, in the first two paragraphs the subject of hiring hall and port expenses in out ports is discussed. Is that the same subject to which I made reference previously? A. I think so.

Q. And that matter has been entirely disposed of? [113] A. It has been settled.

Q. In the third paragraph on the second page of this exhibit is a report relative to the tender by the defendant of their check to which reference has been made heretofore for their 1943 assessment, is that correct? A. Yes.

Q. Now, turning to page 3, the first paragraph refers to a suit against Western Stevedore Company. Has that litigation been terminated?

A. Yes.

Q. And is Western Stevedore Company paying up the assessments?

(Testimony of F. P. Foisie.)

A. They have paid up and are continuing to pay.

Q. The remainder of the page of that exhibit deals solely with the subject of hiring halls in out ports?

A. The expense of the hiring halls in out ports, yes.

Q. By the way, the Western Stevedore Company is a Seattle company? A. It is.

Q. And a member of the Coast Association?

A. It is.

Q. On page 4 of this exhibit is the entry relative to the matter of tonnage assessment in which we are directly interested at the moment?

A. Yes.

Q. Now, this exhibit says that Mr. Clapp and Mr. Middleton and Mr. Stocking were present. Are all those gentlemen from Seattle?

A. They are.

Q. And is this Mr. Clapp that is referred to the chairman of the so-called Seattle Committee to whom reference has been [114] heretofore made?

A. Yes.

Q. And also present was Mr. M. G. Ringenberg. Who is he?

A. The manager in Seattle on the Coast Association staff.

Q. Now, the Committee which was arranged or appointed by the Chair consisted of W. J. Bush, Tom James, W. T. Sexton, R. C. Clapp and Sam Stocking. Were W. J. Bush, Tom James, W. T.

(Testimony of F. P. Foisie.)

Sexton members of the so-called San Francisco Committee to whom reference has heretofore been made? A. They were.

Q. And R. C. Clapp was chairman of the so-called Seattle Committee? A. Yes.

Q. And Mr. Stocking is a resident of Tacoma? A. Yes.

Q. Mr. Foisie, referring again to Plaintiff's Exhibit 36 will you state who Mr. Harrison therein referred to is?

A. He is counsel for the Coast Association in San Francisco, a member of the firm of Brobeck, Phleger & Harrison.

Q. And is the Mr. Dobrin referred to in this exhibit myself?

A. One and the same.

Q. Referring to Mr. Harrison's statement as expressed there as to my views relative to the problem presented by the tender of a check in less than the full amount of the tonnage assessment, do you recall that despite Mr. Harrison's statement there, that I had a conversation with you over the phone about the suit?

A. You did.

Q. And do you recall that I expressed no doubt but advised you that you could not accept the check and still sue for anything [115] more?

A. Yes, sir, and we followed your advice.

Q. It was my advice to you that a defense would then be asserted of an accord and satisfaction?

A. You did.

(Testimony of F. P. Foisie.)

Q. And Mr. R. C. Clapp, to which reference has been made at various times in connection with this trial, is engaged in what business?

A. Stevedoring.

Q. And the name of his firm is what?

A. Rothschild-International.

Q. Rothschild-International Stevedoring Company?

A. Yes.

Q. And they operate in Seattle and other Puget Sound ports?

A. They do.

Q. Did the committee which was appointed by the chair as shown by the last page of Plaintiff's Exhibit 36 meet to consider the problems submitted to them by the directors of the plaintiff Association?

A. It did.

Q. How long did it meet?

A. The better part of a day and a half.

Q. Did that committee ever make a written report?

A. I think it did not. It drafted a report. It drafted something and then abandoned it as unworkable.

Q. Did the members of that committee report to you conclusions which they had reached, as president of the plaintiff Association?

A. The committee did.

Q. And what conclusions did they advise you that they had [116] reached?

A. That they could reach no program satisfactory even within the committee or which they felt

(Testimony of F. P. Foisie.)

could satisfy the Seattle members on the basis of a man hour program.

Q. What did they recommend?

A. Abandoning the effort.

Q. Was that the unanimous voice of that committee? A. It was.

Q. Physically, Mr. Foisie, what constitutes loading and/or discharging a vessel?

A. It means the lifting of the cargo at ship side and stowing it in the hold or on deck or the breaking out of the cargo from the hold and discharging it alongside of the ship.

Q. And is that operation commonly referred to as stevedoring? A. It is.

Q. Is the handling of cargo to the ship side from wherever it may be on a pier or dock or from the ship side to wherever it is thereafter going on the pier or dock referred to as handling?

A. It is.

Q. Is that likewise also expressed as dock work?

A. It is.

Q. The expression "terminal operators" has been used from time to time in connection with this trial. What type of service does a terminal operator perform?

A. Assembling and handling and delivering cargo on the terminal to or from cars, to or from trucks, to or from ship, to or from barge.

Q. Is the loading from or the discharge to cars, barges, [117] lighters, trucks, highway trucks or other means of public conveyance when alongside

(Testimony of F. P. Foisie.)

the ship a part of the loading and discharging operation?

A. If directly at ships hook, yes.

Q. That is to say, when that equipment is right at the vessel's side? A. Yes.

Q. Is that referred to as direct handling?

A. Yes.

Q. In the loading and discharging movement?

A. Yes.

Q. Now, in adopting the tonnage assesment in the by-laws, was that tonnage assessment adopted for charge against all members loading and/or discharging vessels? A. It was.

Q. Was it in any sense limited to the type of member the person might be in the Coast Association? A. It was not.

Q. Do all classes of members variously load and/or discharge cargo from time to time?

A. Yes, all three, terminal, stevedore and steamship companies, do at times load or discharge ships though, generally, steamship and stevedoring companies load or discharge ships. Occasionally a terminal operator will.

Q. From the beginning of the Association up to the present, has it always been the position of the Coast Association that whoever the member may be who loads and discharges the ship, that he is required to pay the tonnage assessment?

A. Yes? [118]

Q. Whether he be a stevedore or whether he be a ship operator?

(Testimony of F. P. Foisie.)

A. Yes, and in a few instances where terminal operators loaded or discharged cargo, the terminal company has paid.

Q. Is it correct then to say, Mr. Foisie, that the question of liability for the tonnage assessment rests solely on the question as to whether or not the individual loads and/or discharges the cargo?

A. That is right.

Q. Does the tonnage assessment have anything to do with what anyone may thereafter do with the cargo, after it is discharged or before it is loaded?

A. No.

Q. Have all types of members of the Coast Association paid the tonnage assessment for loading and discharging cargo from the beginning?

A. They have and do.

Q. I show you what is in evidence as Plaintiff's Exhibit 10, being the so-called memorandum agreement. Do you recognize that?

A. I do.

Q. Will you please advise the Court why that particular memorandum of agreement was introduced in this question of tonnage assessment?

A. This was introduced at the request of stevedores, who wanted to be certain that the tramp vessels, the occasional vessels for whom there was no resident company or resident agent, all had this assessment, which is carried by the contract stevedore over into his contract, largely as a matter of being certain that there would not be unfair [119] competition between stevedores in manipulating cargo handling rates and because all of the steam-

(Testimony of F. P. Foisie.)

ship companies in competition with the tramp ships did not want to be at a competitive disadvantage, the member lines as against the non-member tramp ships.

Q. Now, I call your attention, Mr. Foisie, to Item 1 on the last page of the exhibit. Will you please explain to what subject that was addressed and its purpose?

A. We have encountered from time to time duplicate reporting and duplicate payment of tonnage tax by a steamship company and its stevedore or several steamship companies and their respective stevedores. We have an instance in point occurring here now. By giving stevedore companies a list of member companies who have accepted responsibility for paying the tonnage tax, they were thereby spared any necessity of paying any such tax and then having some readjustment made. There are member steamship companies who did not accept the payment of tonnage tax, and for those persons the stevedore does pay. The arrangement has varied with the several companies concerned. In the main, though by no mean always, the member steamship companies pay the tax direct; but there are still companies today that never have paid the tonnage tax, steamship companies for whom that tonnage tax has been paid by their contract stevedores.

Q. Now, in a loading and/or discharging operation by a stevedore member of the Coast Association for a ship owner members of the Coast Asso-

(Testimony of F. P. Foisie.)

ciation, is the obligation on both of those companies to pay the tonnage assessment?

A. It is; but it is only paid once. However, the contractual [120] arrangements are made between them, and those contractual arrangements vary not only between companies, but at times they have varied in the relationships of the two companies.

Q. Has the or had the practice in the past become quite extensive, that in the main the shipping companies reported the tonnage and paid the tonnage assessment? A. Yes.

Q. But in the way you have described that was not the universal practice?

A. By no means. That arises out of the habit of the steamship companies to pay once for all of their operations on the coast, which they, many of them, say, makes for a cleaner, firmer, tighter method of keeping their accounts than to have them come up through the several ports. Some of the companies prefer to have it come up through the several ports and have continued to use it through their stevedores.

Q. So far as the Coast Association was concerned, the payment of the tax by the one who loaded and discharged a vessel was all that has ever been required?

A. That is correct. Where it has been paid twice, it has been refunded. Our system of checking assures there can be no payment twice.

Q. But if it is, it is refunded?

A. Yes, it is refunded.

(Testimony of F. P. Foisie.)

Q. Have members of the Coast Association from the beginning loaded and/or discharged cargo for the Army, the Navy and other government agencies?

A. Oh, yes, the Department of the Interior and others.

Q. From the beginning of the Association? [121]

A. Yes.

Q. Have members who have so loaded and/or discharged cargo for the Army, the Navy, and other government agencies from the beginning paid to the Association the tonnage assessment?

A. Oh, yes; those who loaded or discharged the cargo.

Q. From the beginning? A. Yes.

Q. And still are? A. And still are.

Q. That includes the defendant in this case up to the end of the year 1942 so far as Army cargo is concerned? A. Yes.

Q. Has the defendant company reported and paid the tonnage assessment on cargo handled for the War Shipping Administration right up to and including 1944?

A. Yes, as long as it continued to unload cargo.

Q. Prior to this litigation has the defendant company ever raised any issue about paying the tonnage assessment on cargo loaded and/or discharged for the War Shipping Administration?

A. So far as my knowledge goes, it has never raised the issue officially, and I haven't heard of them having raised it unofficially.

(Testimony of F. P. Foisie.)

(Three contracts designated Exhibits 19, 20 and 21, numbered W2031-qm-477, O. I. No. 77; W 2031-tc-1190, O. I. No. 69; and W 45-045-tc- 274, O. I. No. 274-44, were marked Plaintiff's Exhibits 37, 38 and 39, respectively, for identification.)

Mr. Dobrin: I offer in evidence at this time Plaintiff's Interrogatory No. 5 to the defendant and [122] defendant's answer thereto as follows— Oh, I will have to go back. Plaintiff's Interrogatory No. 3 to the defendant and defendant's answer:

“In connection with your answer to Interrogatory No. 1, state or indicate in the information supplied in respect thereto which of the vessels were loaded or discharged for or on account of the United States of America and indicate for which agency thereof, as for example, the War Department, the Department of the Navy, the War Shipping Administration or other agency or subordinate agency.

“A. See answer to Interrogatory No. 1.”

The Court: You have offered Plaintiff's Interrogatory No. 3 and such answer?

Mr. Dobrin: Yes.

The Court: Admitted.

Mr. Dobrin: I offer in evidence Plaintiff's Interrogatory No. 4 to the defendant and defendant's answer thereto as follows:

“Q. If in connection with your answer to Interrogatory No. 3 you state or indicate that certain of the vessels were loaded or discharged for or on

(Testimony of F. P. Foisie.)

account of the United States of America, state whether such work was done under a written contract or contracts.

“A. All work performed in connection with the cargo mentioned in the answer to Interrogatory No. 1 was performed under written contracts with the War Shipping Administration and the United States Army, respectively.”

The Court: Admitted.

Mr. Dobrin: I offer in evidence Plaintiff's [123] Interrogatory No. 5 to the defendant and defendant's answer thereto:

“If in connection with your answer to Interrogatory No. 4 you state that such work was done under a written contract or contracts, furnish a copy of said contract or contracts, and if there are more than one contract, state as to each vessel under which contract the work was being performed.

“A. Defendant supplies herewith copies of the following contracts with the United States Army: 1. Contract No. W 2031-qm-577, O. I. No. 77, dated August 22, 1942 marked Exhibit 19. 2. Contract No. W 2031-tc-1190, O. I. No. 69, dated July 1, 1943, marked Exhibit 20. 3. Contract No. W 45-045-tc-274, O. I. No. 274-44, dated June 30, 1944, marked Exhibit 21.”

By agreement with counsel there has been eliminated from each of the three contract unit prices charged by the defendant for its services.

The Court: Admitted.

Mr. Gose: I think for the sake of clarity it

(Testimony of F. P. Foisie.)

might be stated for the record that those numbers 19, 20 and 21 were exhibits attached to the interrogatories.

Mr. Dobrin: If you will wait a minute, I will see there is no confusion about that. I now offer in evidence as Plaintiff's Exhibit 37 the exhibit 19 referred to in the last interrogatory and answer thereto.

The Court: Admitted.

(Document previously marked Plaintiff's Exhibit No. 37 for identification was received in evidence.) [124]

Mr. Dobrin: I offer in evidence as Plaintiff's Exhibit 38 the exhibit 20 referred to in the last preceding interrogatory and answer.

The Court: Admitted.

(Document previously marked as Plaintiff's Exhibit No. 38 for identification was received in evidence.)

Mr. Dobrin: I offer in evidence as Plaintiff's Exhibit 39 exhibit 21 referred to in the last mentioned interrogatory and answer thereto.

The Court: Admitted.

(Document previously marked Plaintiff's Exhibit No. 39 for identification was received in evidence.)

The Court: Well, gentlemen, it is almost noon and I have some other matters. I think we should recess this case until 2:00 o'clock.

(Whereupon, a recess was had herein until 2:00 p.m.)

(Testimony of F. P. Foisie.)

The Court: You may proceed.

Mr. Dobrin: Mark this please.

(Letters dated September 2, 1944, and September 11, 1944, together with stevedoring contract marked Plaintiff's Exhibit 40 for identification.)

Mr. Dobrin: I offer in evidence as Plaintiff's Exhibit 40 the contract between the defendant in this case and the War Shipping Administration, being Contract No. WSA 4-1486.

The Court: That is a contract between——

Mr. Dobrin: The defendant and the War Shipping [125] Administration or more properly between the United States of America and the defendant.

The Court: Exhibit 40 is offered and admitted.

(Documents previously marked Plaintiff's Exhibit No. 40 for identification were received in evidence.)

Mr. Gose: I would like to have your Honor examine Exhibit 37 please. I desire, if your Honor please, to call your Honor's attention to certain portions of that contract at this time.

The Court: All right.

Mr. Dobrin: If you will note that Sheet 2, please—I think they are marked at the bottom—on Exhibit 37——

The Court: All right. I find it.

Mr. Gose: Those have been admitted in evidence, haven't they?

(Testimony of F. P. Foisie.)

Mr. Dobrin: Yes, they have. I just direct your Honor's attention to the coverage of the contract as it appears in the upper portion of that sheet, the loading and/or discharging of cargo. Then I call your Honor's attention to General Conditions on Sheet 2, Item B. First, I call your Honor's attention to the fact that the compensation provided for—and the amount of which is x-ed out—is on a unit price. Then if you will look in Paragraph B you will find a provision that the workmen's unit price is based on the straight time basis, and provision is made for work performed on an overtime basis. And I want particularly to call your Honor's attention to the fact that such rate on an overtime basis will include—and I am reading from B—“actual payroll costs per man [126] hour plus insurance, Federal and State taxes, assessments and other overhead charges.”

I call your Honor's attention to Paragraph D of the same agreement, in which provision is made for extra labor to be performed in addition to the unit price schedule—to the provision that such charges are to be based “on the actual payroll cost per man-hour and insurance, Federal and State taxes, assessments and supervisory charges.”

And I call your Honor's attention to a portion of this contract which you will find near the end of it, about the fourth sheet from the end, called “Change Order C” and to Paragraph (b) O, right in the center, and which also has a provision covering extra labor, and particularly call attention to

(Testimony of F. P. Foisie.)

the fact that the charges thereon are "based upon actual payroll cost per man per hour plus insurance, any Federal or State taxes, assessments and any other overhead charges."

Now, referring to Exhibit 38, if your Honor please—I may say that the previous contract is the one that covers to June, 1943—the next exhibit you are examining, 38, is from that period to June of 1944. And I call your Honor's attention on that exhibit to Sheet 2 which shows the work that is to be performed and the charge on a unit price basis, similar to in the previous contract, and then I call your Honor's attention to Sheet 4, "Special Conditions," Paragraph C, which is in the previous contract in reference to extra labor, that the same is based "on the actual payroll cost per man-hour plus insurance, Federal and State taxes, assessments [127] and any other supervisory charges."

And to Paragraph D, referring to Checking Services, and again pointing out that the charge is to be based "upon the actual payroll cost per man per hour plus insurance, Federal and State taxes, assessments and any other overhead charges."

And calling your Honor's attention to Sheet 5, Item F, which has to do with car loading and car unloading—well, I am not going to call your Honor's attention to that because that is on a different subject, so it will not be necessary to note that. I call your Honor's attention to Item J on page 5, where provision is made for compensation to the contractor in event of delays and that compensa-

(Testimony of F. P. Foisie.)

tion, as in the previous ones, is "based upon the actual payroll cost per man per hour plus insurance, Federal and State taxes, assessments and any other overhead charges."

Now, referring to Exhibit 39, this is the contract from July 1, 1944, to June 30, 1945, and I call your Honor's attention to page 2, Paragraph A, which covers the services to be performed at the rates as per a schedule to be attached; and then in connection with that contract I ask your Honor to look at Sheet 5, Item Q, referring to travel time, and point out to your Honor that "when the contractor is required to pay traveling time in accordance with existing agreement with Waterfront Employers Association to the men employed, the contractor shall be paid at the rate specified under travel time, Schedule 111, when approved by the contracting officer."

I call your Honor's attention to Supplemental Agreement C—it is the last three pages of the document—and I call your Honor's attention to this language occurring in the third paragraph of that Supplement C, "Whereas the prevailing rate of such subsistence allowance for longshoremen and stevedores in the Puget Sound area is per day, pursuant to agreement between Waterfront Employers of Washington and the International Longshoremen's and Warehousemen's Union, which was approved by the National War Labor Board through its Twelfth Regional Board, by an award

(Testimony of F. P. Foisie.)

dated and effective June 1, 1944," and the next paragraph,

"Whereas the existing recognized agreement between the Waterfront Employers of Washington and the Union requires employers of checkers, supervisors and/or clerks to pay such employees the expense of meals away from their home port, the prevailing and recognized allowance for which is two meals per day at per meal, amounting to per day," and on the next page of the agreement, paragraph numbered 2, the quoted portion, "When the contractor is required under prevailing labor agreements to pay allowance for subsistence, or per diem in lieu thereof, to long-shoremen, stevedores, checkers, supervisors or clerks who are employed and working away from their ports of registration, contractors shall be reimbursed"—and then going on with the nature of the reimbursement, showing the reference throughout those contracts to the labor agreements in force.

Now, coming to Exhibit 40, that agreement is in two parts. Unfortunately, I don't have a copy, but I will do my best to describe what I would like to have you look [129] at from my notes. I would like to have your Honor look in Part 1, Item 2 (b) (2). Does your Honor find that?

The Court: Yes, I find it.

Mr. Dobrin: (Reading) "As payment for supervision, use of gear, overhead and compensation on all cargo other than as described in sub-para-

(Testimony of F. P. Foisie.)

graphs"—and listing certain others—"at the rate of 22½¢ per ton."

The Court: That is not 2(b)(2).

Mr. Dobrin: I am sorry, your Honor. That is 2(b)(1). And then going back and looking at Paragraph 2(a) preceding that, "As payment for disbursements made or obligations incurred in connection with the work, a sum equal to the total of the amounts paid by the stevedore as wages, insurance and other authorized costs"—

I point those sections out to you to indicate that compensation under that contract is in two forms: One is payment for supervision and use of the gear furnished, a compensation in a limited sum; the other for the actual cost incident to the payment of wages.

Then if you will kindly look at Part 2, Section 1(b), do you find that?

The Court: Section 1(b)? I have it.

Mr. Dobrin: Yes, I think it is the second paragraph of that, which reads:

"The term 'wages' "—Is that the way it reads?

The Court: Yes.

Mr. Dobrin: (Reading) "The term 'wages' as used in this contract does not include contributions or payments made by the stevedore for the maintenance of hiring [130] halls as such contributions or payments are part of the stevedore's general supervisory and administrative expenses and are not expenditures for wages," showing that that item is included in the item in Part 1, Section 2(b)(1) to

(Testimony of F. P. Foisie.)

which I called your Honor's attention, and not in the part relative to wages.

Q. Mr. Foisie, do you have with you a copy of Exhibit 34?

A. If that is a copy of the agreement?

Q. That is correct. A. Yes.

Q. Now, if you will refer, your Honor, to Exhibit 34 please; Mr. Foisie, will you please take Exhibit 34 and point out to the Court those obligations of the Waterfront Employers Association of the Pacific Coast under that agreement to be performed for and on behalf of its members that no member itself could perform?

A. Begining on page 1, Paragraph 1, the Coast Association on behalf of the Waterfront Employers of Washington and so forth negotiates the contract, makes the agreement, and in case, at the bottom of page 1, either side opens up the agreement within 60 days, 60 days prior to the conclusion of the agreement, then the Association either itself makes proposals for the members or deals with the proposals made by the Union.

Q. Now what Association does that?

A. The Coast Association. I will try to make that clear hereafter.

Q. Well, is it fair to say this, that whenever you are referring to an Association in connection with this agreement, [131] you are referring to the Coast Association?

A. I think in all instances, yes. We may turn now to page 8, Section 4. The hiring halls are set

(Testimony of F. P. Foisie.)

up in the several ports under joint control, operation and expense. The Coast Association having the entire cost of the employers part of that expense, and the local association or member association, in this instance Washington, having no part of that expense.

Q. And no individual member?

A. And no individual member having any expense whatsoever in connection with the hiring halls. On the next page, Section 6, no individual has anything to do with the determination of the application of that section having to do with preference of employment.

Mr. Gose: Pardon me. I don't follow you. Which page are you referring to?

The Witness: Page 9, Section 6. I am sorry.

A. (Resuming) No individual member has anything to do with the matter of preference of employment. That is entirely a matter of the Coast Association working through the Joint Labor Relations Committee. If there is to be an objection by an employer to any particular man under the preference clause or the registration clause, that objection must be through the Association and under its policies and by its representatives. In the second item, Section 7, page 9, Election Day, no individual employer makes the particular hourly arrangements about when his employees may go to vote. The Labor Relations Committee works with the Union to set a uniform time. Usually it means that on election day the Union and the Association

(Testimony of F. P. Foisie.)

agrees in all [132] ports to have no work done between 7:00 and 9:00 in the morning. Men who might report as early as 7:00 or 8:00 o'clock are ordered to report at 9:00 instead.

Section 8, all of the hiring halls in the larger ports and all those in the smaller ports, a total of fifteen on the coast, where they have them—in some of the very small ports they don't have hiring halls—all of those hiring halls are set up by the Employers Association of the Pacific Coast and under its control and at its expense though administered through the local association.

Page 10, Section 9, there is established therein a Coast Labor Relations Committee of six members, three designated by the Coast Association and three by the Coast Union. The port Labor Relations Committees are established in consonance with this agreement by the port association and the local union and under the direction and control of the Coast Union on the one hand and the Coast Employers Association on the other. The second paragraph of Section 9, "The Coast Labor Relations Committee shall have power and jurisdiction to determine any question involving the interpretation of this agreement and to decide any dispute arising thereunder. The Coast Labor Relations Committee shall have power to set aside any decision or other action of any port Labor Relations Committee and shall have the power and duty to establish uniform coast working and dispatching rules for any or all of the ports affected hereby and to interpret and

(Testimony of F. P. Foisie.)

apply the same.” That is by request of the different unions as a result of experience and similarly out of the experience of the Coast Employers Association because only [133] in that way could there be reasonable uniformity in the administration of this contract and the minimizing of disputes. When a Coast arbitrator is selected at the beginning of the contract, each time it is amended, the selection of the Coast arbitrator is by the Coast Association with the Coast Union, or if they fail to agree or by request of either party to the Secretary of Labor. There was prior to the war—on page 11, the first complete paragraph—the naming of arbitrators’ agents. They have been set aside for the war, but will be resumed following the war. Quoting from that paragraph: “All expenses of the Coast arbitrator and of the arbitrator’s agents and their respective compensations or salaries shall be equally borne by the parties.”

Q. And by that reference to “parties” is meant whom?

A. The parties who made the contract, the Coast Association and the Coast Union. (Reading) “In the event that any port Labor Relations Committee shall fail to agree on any question before it, it shall be immediately referred at the request of either party to the Coast Labor Relations Committee for decision. In the event that the Coast Labor Relations Committee fails to agree on any question involving the interpretation of this agreement or any dispute arising hereunder, or upon any other ques-

(Testimony of F. P. Foisie.)

tion of mutual concern not covered by this contract and relating to the industry, such question shall, at the request of either party, be referred to the Coast arbitrator for decision." All hearings before the arbitrator are held by and in the name of and at the expense of the Coast Association for the employer. [134]

The Court: Is there any reason to take this time to have the witness read an exhibit?

Mr. Gose: Not as far as I am concerned.

Q. It is not necessary that you read anything from the contract. Just eliminate that. All I want you to do is point out those parts of the contract which only the Coast Association can perform for its members.

The Court: Why cannot counsel do it in argument?

Mr. Gose: I may say, your Honor, I have a line of objection to all of this line of testimony as to all the things that the Coast Association does. I think they are in no sense material.

The Court: It seems to me the witness so far has only been saying things that you can say in argument.

Mr. Dobrin: I know, your Honor, but I didn't know but what maybe it would be preferable to have the witness testify to that.

The Court: If this contract is unclear and does not state it and requires the witness to interpret it, then we come to the question as to whether we have an ambiguous contract that we have to interpret.

(Testimony of F. P. Foisie.)

But if the contract is clear, there is no reason for the time being taken. Now, you know whether it is obscure and ambiguous and clear.

Q. In the light of the Court's remarks, Mr. Foisie, is there any special section of the contract then to which you would want to make reference?

A. None except as it is clearly set forth in the contract itself where the references, I think, are self-revealing.

Q. Mr. Foisie, I think the testimony already shows, but are [135] the employees of the defendant in this case dispatched to handle other work as a result of this agreement?

A. Yes, in port labor work.

Mr. Dobrin: Mark this please.

(Tabulation of total man hours for Puget Sound District and total man hours for "Griffiths Company," 1943, (same district) was marked Plaintiff's Exhibit No. 41 for identification.)

(Similar tabulation for 1944 was marked Plaintiff's Exhibit No. 42 for identification.)

(Tabulation for 1943 of total Seattle man-hours (Seattle) and Griffiths man-hours (Seattle) marked Plaintiff's Exhibit No. 43 for identification.)

(Similar tabulation for year 1944 was marked Plaintiff's Exhibit No. 44 for identification.)

(Testimony of F. P. Foisie.)

Q. Will you inspect Exhibit 41, Mr. Foisie, and tell us what that exhibit purports to disclose?

A. This is a compilation and a comparison of the total man-hours for the Puget Sound District of member companies with the Griffiths Company, set out for comparative purposes; that is Griffiths and Sprague.

Q. For what year? A. 1943.

Q. And is it divided between the man-hours of work both ship and dock?

A. It is, and it is separated for the ports of Seattle, Tacoma and Everett.

Mr. Dobrin: I offer Exhibit 41 in evidence.

Mr. Gose: I am not clear what the purpose of it is. Your action, of course, is on the 21½¢ tonnage tax. [136]

Mr. Dobrin: That is right.

Mr. Gose: May I inquire as to the purpose of offering the man-hour schedule?

Mr. Dobrin: You may inquire if you are objecting, but if you are not I don't think the answer is material.

Mr. Gose: Then I will object, your Honor, on the ground I can see no materiality to this schedule of number of man-hours of work done where the suit is predicated entirely on the amount of tonnage handled.

Mr. Dobrin: The purpose is to show the extent to which the defendant in this case uses the services of the plaintiff.

The Court: Ruling reserved.

(Testimony of F. P. Foisie.)

Mr. Gose: I will say for the sake of the record I should then amplify my objection to the extent of saying this, that I take the position it is utterly immaterial, to what extent we used their service. Their suit for tax is not predicated on that at all. The claim in this case is predicated upon the tonnage assessment.

Mr. Dobrin: That is correct.

The Court: Exhibit 41 has been offered, objection has been made and ruling is reserved.

Q. With reference to Exhibit 41, what does the expression used on that exhibit of "ship" refer to?

A. That means the man-hours used in loading or discharging vessels.

Q. What does the expression "dock" mean?

A. In connection with the computation it means the number of man-hours worked handling cargo anywhere on the dock other than the two sling men at the ship's side. [137]

Q. Are those two men at ship's side a part of the loading or discharging operation?

A. They are.

Q. They are the men who hook onto the ship's sling and release the ship's sling?

A. That is correct.

Q. Now, with reference to Exhibit 41, what percentage of the total man-hours of the entire Puget Sound District were used of the labor pool in this district by the defendant in this case for ship's work?

A. For ship's work, 42% of the man-hours were

(Testimony of F. P. Foisie.)

by Griffiths and Sprague of the total, including Griffiths and Sprague, of all employers in all Puget Sound Washington ports.

Q. And what percentage of the total man-hours of labor for dock work in the Puget Sound area did Griffiths and Sprague use? A. 15%

Q. And that is for the year 1943?

A. It is.

Q. And during that period in what ports were these men used?

A. Griffiths and Sprague men were used in the three ports of Seattle, Tacoma and Everett. The total man-hours included all the ports in addition to those three.

Q. I show you Exhibit 42 and ask you if that gives the same thing for the year 1944.

A. It does.

Mr. Gose: May the record show the same objection as to this exhibit?

The Court: Ruling reserved.

Q. Will you state the percentage of man-hours of the pool of [138] longshore labor in this district used by Griffiths and Sprague during the year 1944?

A. Griffiths and Sprague employed of all of the man-hours used by all the companies in loading and discharging cargo 43% of the man-hours and on the Dock 15% similarly.

Q. I show you what is marked Plaintiff's Exhibit 43 and ask you what that exhibit purports to show.

(Testimony of F. P. Foisie.)

A. That is a compilation of total man-hours in Seattle as distinguished from the area.

Mr. Gose: That is 42 you were talking about?

Mr. Dobrin: Yes.

Q. For what year? A. 1943.

Mr. Gose: May it be understood without the necessity of my interrupting that my objection runs to Exhibits 43 and 44 the same as to the previous Exhibits 41 and 42?

The Court: I think so that there will be no misunderstanding as to what you are objecting to, you should object in each instance.

Mr. Gose: Very well.

Q. Go ahead.

A. This is the compilation for 1943 of the total Seattle man-hours ship and dock and the total Griffiths and Sprague man-hours ship and dock for Seattle.

Q. What for the year 1943 was the percentage of total man-power pool in Seattle that Griffiths and Sprague used for ship work?

A. 53 and something; more than 53%.

Q. And for both ship and dock work? [139]

A. I am sorry. I will have to compute this. I think my previous computation here is in error. I think about 40%. I am not sure of that figure, and I would like to verify it.

Q. In any event, that is a mathematical computation by adding the column?

A. That is right.

Q. I show you Exhibit 44 and ask you if that

(Testimony of F. P. Foisie.)

gives the same information for the year 1944 as Exhibit 43 did for the year 1943? A. Yes.

Q. And can you tell us the percentage of the pool of labor in Seattle which Griffiths and Sprague used for ship work during 1944?

A. 63% of the ship work in Seattle was for Griffiths and Sprague and by them.

Q. And what was their percentage of all labor, both ship and dock? A. 40%.

Q. I call your attention to the month of November, 1944, and ask you whether that information is given without calculating any amount used by Griffiths and Sprague for that month?

A. Because no reports were made, the absence of Griffiths and Sprague figures, it would mean the percentages I gave you are below the actual figures, if we knew the Griffiths and Sprague figures for November.

Mr. Dobrin: I offer in evidence Exhibits 41, 42, 43 and 44.

Mr. Gose: If your Honor please, I think I will withdraw my objection that I previously made. I think those exhibits are satisfactory for some other purposes.

The Court: All right. Exhibits 41, 42, 43 and 44 are admitted, there being no objection and all previous objections thereto being withdrawn?

Mr. Gose: Yes.

(Documents previously marked Plaintiff's Exhibits 41, 42, 43 and 44 for identification were received in evidence.)

(Testimony of F. P. Foisie.)

Q. Were all the men to whom reference was made in the Exhibits 41, 42, 43 and 44 for man-hours drawn from the hiring halls in the respective ports?

A. Yes.

Q. And all subject to the contract in evidence here as Exhibit 34?

A. Plus the contract in Tacoma.

Q. Plus the contract in Tacoma, to which reference has been made.

A. Yes.

Q. And would that also require a further clarification as to men performing dock work under local dock agreements?

A. They all come from the halls.

Q. They all come from the halls also. Now, Mr. Foisie, will you please tell us what services of value in addition to the labor contract, which is in evidence, and other labor contracts concerning which you testified, are obtained by the defendant in this case by reason of its membership in the plaintiff?

A. First, as to the Association itself, membership in it——

Q. You are referring to the Coast Association?

A. Yes. Independent of the labor contract, the umbrella of the Association is held over the heads of all its members in time of difficulty, labor difficulty of any sort. The weight of the industry is behind each and every member of the Association, however small or large, and equally, if a member company is in distress on its labor problems, if a ship of a company is tied up——

(Testimony of F. P. Foisie.)

Mr. Gose: Just a minute. You are not maintaining this defendant is a ship owner?

The Witness: The defendant company works the ship. If the ship is tied up—I am not arguing; I am just explaining, sir.

Q. Proceed.

A. —the defendant company is then tied up. It ceases to work. I therefore treat the defendant company as I would the ship. If the defendant company happens to be the party at interest that is in trouble when the ship is not, the ship may leave, depending upon her schedule. If the ship is struck for other reasons and the defendant company might not be involved in that dispute, it will be an equally effective tie-up. We cannot very well distinguish between the two because if either is struck, ship or stevedore, both are struck. I think that is a fair statement out of much grief and a lot of experience, so much that there is provision made in our Articles and it has been exercised whereby financial help is provided a member company in difficulty. There has been such instances where stevedores have been compelled to reimburse where circumstances warranted it; ships similarly where they were struck by port labor. There is the association value, [142] the cooperative relationship between competitors in a common endeavor dealing with common problems. There is the pooling of experience back and forth. There is even the interchange of gear and sometimes supervisory forces. Men representing member companies in the As-

(Testimony of F. P. Foisie.)

sociation and holding office among their peers exercise the leadership which goes with that the same as leadership in other fields. There are the satisfactions which come to men today under modern complex conditions——

Mr. Gose: Oh, if the Court please, I wish to interpose an objection to this line of testimony. These are very indirect and abstract benefits that he is talking about to individuals who may be officers of a corporate body which may or may not benefit by virtue of that fact. I think this is altogether too ephemeral and indefinite to be of any value as evidence on the question propounded to the witness.

Mr. Dobrin: I can't agree at all; that is part of the very purpose of such an association, and I——

The Court: (Interposing) Well, counsel, we go now to the question of my right to hear him testify to this. I am not bound to accept his conclusion. If, for instance, he testifies it is of value to the defendant for one of the defendant's officers to be an officer in the Association, it is for me to determine whether that is true or not. I think I will hear it. I may say to counsel that I am not as sure as counsel for the plaintiff or the witness that some of these things are of economic value. You may proceed.

Mr. Dobrin: I am attempting to demonstrate it, [143] your Honor.

The Witness: I will be glad to elaborate on that phase of it.

(Testimony of F. P. Foisie.)

Q. No, proceed.

A. Three members of this firm have held offices in either the local or Coast Associations. One of them all the time in my own acquaintance with him of nearly 25 years. He held office on which from my own intimate acquaintance with him, he placed high value for the resulting status commercially. I think that at least he certainly was satisfied with the relationship.

The Court: (Interposing) Now, just a moment. I will have to strike that.

Mr. Dobrin: That is a little argumentative.

The Court: The conclusion that this witness has that somebody placed value on it will be stricken.

Mr. Dobrin: I agree that that is argumentative.

A. (Resuming) Now, in the sphere of dispute between all branches of the industry and the Wage and Hour Division, and with which the Army, Navy and War Shipping are concerned, there is a matter in which we are deeply engrossed and on which we are spending much time. If the Association loses its case before the Wage and Hour Division in the courts, it is calculated by the members affected, including this defendant company that they will be out of business. We have recently secured, counsel and myself, from the Army, Navy and War Shipping authorities in Washington within the month an amendment of all stevedore contracts with all member companies on this Coast which, at least, will protect all of the member companies beginning [144] February 1st of this year for the

(Testimony of F. P. Foisie.)

future in event of an adverse decision and which for the past leaves the door open for possible reimbursement by congressional relief. And in this issue, by very good fortune, the industry does not stand alone, but has the support and in fact the lead taken by War Shipping, Army and Navy, because they recognize, all branches of the services recognize, that if the courts should hold adversely to their belief as well as our belief, the back wages due coupled with liquidated damages would be ruinous.

Q. And in that activity on behalf of the members has the Coast Association performed that service?

A. It has.

Q. And is it likewise performing that service at the request of the Army, Navy and War Shipping?

A. We are in complete accord and under their leadership. We are developing the industrial background, which will be the basis for the court suit.

Q. Are those three branches of the government calling upon the Coast Association to furnish the data necessary for the defense of the problem involved?

A. They are, and we have furnished it and will continue to.

The Court: This is a time and one-half dispute?

The Witness: It is something which threatens to engulf us.

The Court: I won't say for overtime; I will say for alleged overtime because that is probably——

The Witness: That is the issue.

(Testimony of F. P. Foisie.)

The Court: You are contending it is not overtime and your opponents are contending it is? [145]

The Witness: Pardon me, your Honor. We are contending it is true overtime when it is time and a half under the labor contract. The Wage and Hour Division is contending it is not.

The Court: All right. There is a dispute as to whether it is or is not.

The Witness: That is correct.

Q. Now is the handling of that matter one involving expense? A. Heavy.

Q. And the Coast Association on behalf of its members is bearing that expense?

A. Entirely.

Q. Do you have anything to add now, Mr. Foisie, to any of the testimony that you have heretofore given in direct answer to this question on the subject of services rendered by the Coast Association for its members?

A. I think it need not be repeated so long as it is understood, that to a substantial extent, not exactly measurable, the work of the Accident Prevention Bureau of the Association, at an \$80,000 expense last year and \$100,000 this year, has been a significant factor, by no means the exclusive factor, in the reduction of the premium costs, which have fallen steadily on this Coast to the point where it is 8.6 compared with the East Coast, where this effort is not conducted, of 15% of the payroll.

Q. And when you say 8.6, is that 8.6 per cent?

A. Eight and six-tenths of the stevedore dollar

(Testimony of F. P. Foisie.)

as against 15c of the stevedore dollar on the East Coast. It is true that the services receive the benefit of that, at least in the cost plus and fixed fee, but it doesn't in any [146] sense alter the commercial benefit to the member companies.

Q. And those percentages to which you referred are insurance premiums?

A. That is correct, for offshore insurance.

Q. In your testimony previously, Mr. Foisie, reference was made to Mr. Joseph Weber of Griffiths and Sprague, the stevedore defendant, and I wish you would tell us, with the dates, the offices that Mr. Weber held both in the Washington Association and in the Coast Association.

A. I think I did before.

Q. I don't think you gave the dates. I think you covered it just generally.

A. He was the chairman of the committee appointed to employ a manager in 1920. He was vice president of the Waterfront Employers of Seattle in 1922; president in 1923-24; trustee in 1923-41, the time of his retirement. All this was in connection with the Waterfront Employers of Washington. From 1929 to 1933 he was a member of the Joint Committee of men and management; he was a member of the early Safety Committee—helped organize it—from 1924 to 1930; he was a member of the Safety Committee in 1936-40, when it had been converted to a Coast Committee.

The Court: It is understood that any time any

(Testimony of F. P. Foisie.)

party wishes to object, that they have to make their objection known.

Mr. Gose: If the Court please, I don't know how long you want us to be entertained, but I am certainly objecting to all this line of testimony. I haven't been able to see, if your Honor please, since the beginning how the fact that one of the defendant's officials or [147] employees held a position in the plaintiff company had anything to do with the issue in this case.

The Court: Well, counsel, I am interested in the time. It is always helpful to a court or jury to have enough of the history so that the court or jury understands the critical period. But it seems to me the history has been pretty substantially given, and I now can see no help to me in knowing whether Mr. Weber was or was not an officer of an organization which existed before the plaintiff ever came into being.

Mr. Dobrin: Well, he has mentioned the last of that. There will be no more mention of that.

Mr. Gose: What he has mentioned to date, if I understand it correctly, is not any position held with the plaintiff but with the Washington Association.

Mr. Dobrin: No, you didn't understand it correctly.

The Court: Well, it couldn't be the plaintiff prior to 1937, obviously.

Mr. Dobrin: That is right.

Q. Now, you may proceed, and from this point

(Testimony of F. P. Foisie.)

on with Mr. J. Weber leave out anything prior to 1937 which has anything to do with the Coast activity.

A. From 1937 to 1941 he was continuously an associate director of the Coast Association and met quarterly in San Francisco.

Q. Now, will you state what offices the defendant's president Frank Settersten has held and does hold with the Waterfront Employers of Washington?

A. In 1940 a member of the Accident Prevention Committee. 1942 to 1945—— [148]

Q. Not too fast. In 1940 he was what?

Mr. Gose: That was the Waterfront Employers of Washington?

Mr. Dobrin: No, the Accident Prevention Bureau.

Mr. Gose: I thought your question was——

Mr. Dobrin: It was with both.

Mr. Gose: Both? I will object in so far as it pertains to the Waterfront Employers of Washington. I don't think that is material.

The Court: I think in any event the question should be segregated. You may ask him what offices he held with plaintiff.

Q. What offices did he hold in connection with Coast activities directly?

Mr. Gose: Now, I object to that, if the Court please. If he means with the Coast Association, using the term interchangeably with the plaintiff,

(Testimony of F. P. Foisie.)

that is one thing, but this Coast activity in another thing.

Q. Well, Coast Association.

A. He was a member in 1940 of the Accident Prevention Committee for Seattle of the Waterfront Employers Association of the Pacific Coast.

Q. What offices or committee service did he perform or has he performed for the Waterfront Employers of Washington?

A. A trustee from 1942 to 1945; and continuing, a member of the Finance Committee.

Q. He is still a trustee of the Waterfront Employers of Washington?

A. And continuing; and a member of the Finance Committee during that period of time. [149]

Q. Now, referring to M. J. Weber, vice-president of the defendant, what offices has he held in connection with the Coast Association?

A. As a member of the Puget Sound District of the Accident Prevention Bureau from 1939 to 1941; in 1941 the chairman of the sub-committee of publicity and safety awards of that bureau of the Coast Association.

Q. Now, what are the activities of that sub-committee?

A. It is the development of education work with men and companies and the building of competition for the reduction of accidents through the setting up of safety awards. It is about the most effective part of the work of Accident Prevention that could be imagined.

(Testimony of F. P. Foisie.)

Q. Following 1942, did he serve on that committee?

A. He has served on the committee from 1942 through 1943 and 1944 as a member of the committee.

Q. That is the Accident Prevention Committee?

A. That is correct.

Q. And what special position did he hold in 1944 on that committee?

A. I think he was vice-chairman.

Q. In 1944? A. Yes.

Q. Did Mr. Weber serve on the Allocation Committee of the Coast Association?

A. I am not very clear on that. I knew one time when he did several years ago. I don't know what he has done in that direction later.

Q. Do you know whether he did in 1942?

A. I think that was about the time I knew he served in that [150] relationship. That is the committee allocating gangs. We have two forms of allocation, ships and gangs.

Q. Now, is that the allocation function which you described previously in your testimony?

A. Yes.

Q. What does this committee of members do in connection with the staff representative of the Coast Association to whom you referred?

A. When the staff representative gathers all the data and there is a shortage of gangs to meet the need, the committee decides in peace times where they are to be used. Under war time, the circum-

(Testimony of F. P. Foisie.)

stances of urgency of certain ships and the willingness and ability of other ships to delay governs which gets the men.

Q. Has Mr. Weber served on the Labor Relations Committee created under the Coast agreement, Exhibit 34? A. Faithfully.

Q. During what period of time?

A. For the last three years at least.

Q. And at the present time?

A. And at the present time.

Q. And that is the committee which manages the Coast Association agreement locally subject to the reviews which you have and restraints which you have described?

A. That committee administers the agreement in this area.

The Court: Counsel, during the recess I would like to have you seriously consider the plan for what evidence there is to be. It is patent, of course, that this case cannot be finished today, but I see no reasonably opportunity to give you more than Tuesday of next [151] week, and it must be considered that the defendant is entitled to its day in court.

(Recess.)

Q. In referring to the matter of insurance in connection with the Accident Prevention Bureau, you referred to insurance offshore. What were you speaking about there?

A. That is the workmen's compensation insurance required under the Longshoremen's and Har-

(Testimony of F. P. Foisie.)

borworkers' Act, a Federal Act to cover the off-shore personal injuries to longshoremen and other harbor workers.

Q. Mr. Foisie, are you acquainted with whether or not the Army, the Navy and the War Shipping Administration allow the 21½c tonnage assessment as overhead expense of the contractors performing loading and discharging operations for them?

A. I am.

Q. What is their position?

A. They do so allow it.

The Court: What is that?

The Witness: Army, Navy and War Shipping Administration.

Mr. Dobrin: You may inquire.

The Court: Allow these assessments for what?

Mr. Dobrin: As part of the overhead expense of the contractor performing loading and discharging operations for them.

Cross Examination

By Mr. Gose:

Q. Mr. Foisie, I am going to try to ask you as simple and [152] direct questions as possible, and would you please try to answer them in the same fashion? A. I shall try.

Mr. Dobrin: I don't think he should instruct the witness. Let him go ahead and inquire.

Mr. Gose: I am just trying to establish a harmonious relation.

Mr. Dobrin: There is no lack of harmony yet.

(Testimony of F. P. Foisie.)

Q. You mentioned the fact that Mr. Joe Weber was director of the plaintiff corporation from the time of its organization?

A. That is right.

Q. I am going to hand you Plaintiff's Exhibit 1, and I notice in Article 4 there are the names of 17 persons who were the first directors. Is the name of Joseph Weber contained in these 17 names?

A. No.

Q. I will ask you to turn over one page and look at the signatures to the Articles of Incorporation, and I will ask you if the name of Mr. Joseph Weber appears there.

A. That is correct; it does not.

Q. The fact of the matter, as I understand it, Mr. Foisie, is that Mr. Joseph Weber was an associate director, wasn't he?

A. That is correct. I think I replied previously that he was an associate director.

Q. And as an associate director he had no vote, did he?

A. That is correct.

Q. Now, Mr. Foisie, there are two kinds of members of this corporation, aren't there, is that correct? [153]

A. Yes.

Q. And what are they called?

A. Voting members and associate members.

Q. And to be a voting member one must be a steamship company or an agent for a steamship company, is that right?

A. That is correct.

(Testimony of F. P. Foisie.)

Q. And to be an associate member one must be some other type of employer of longshoremen?

A. That is correct.

Q. And the defendant in this case is an associate member, is that correct? A. Yes.

Q. And has never been a voting member?

A. That is correct.

Q. And can never be eligible to be a voting member under the present Constitution and by-laws unless he becomes a steamship operator?

A. Correct.

Q. Does your corporation have a membership book?

A. Yes, I think so. Mr. Boyd, the secretary, can answer the question better.

Q. Are you aware of one personally?

A. Of what?

Q. A membership book.

A. We have a roster of members. I am sorry I don't know what you mean by a membership book.

Q. You have never been advised, I take it, that the laws under which you are organized require this corporation to have a membership book?

A. I am sorry; I cannot say. [154]

Q. You don't recall being so advised?

A. No, we have membership signatures. If that constitutes a book——

Q. Now, taking the defendant in this case, it is an employer of longshoremen, isn't it?

A. Yes.

(Testimony of F. P. Foisie.)

Q. And it is a fact, isn't it, that it must obtain its longshoremen through the local hiring halls as long as the hall has longshoremen available?

A. As a member it must.

Q. As a matter of fact, it would be impossible for it to do business in this port without following that procedure, wouldn't it?

A. As a member it would be. Otherwise, it would be in violation of its labor contract.

Q. They would have to get out of this organization and not be a party to that labor contract. And you know perfectly well in the light of your experience that it would be practically impossible for it to operate without Union longshore labor in this port?

A. That is correct, but that doesn't mean they couldn't get Union longshore labor by making another agreement.

Q. I am not asking you that. I am just asking the question, they couldn't operate in this port without having Union longshore labor?

A. But they could get Union longshore labor by going to the same Union.

Q. Please answer the question. They couldn't operate without Union longshore labor?

A. Yes. [155]

Q. You mean they couldn't operate?

A. They couldn't operate other than by Union longshore labor under this contract.

Q. Mr. Foisie, I believe that it is a fact in this particular port at the present time this de-

(Testimony of F. P. Foisie.)

fendant does employ labor from other places than the hiring halls. Do you know if that is a fact?

A. I understand so in connection with operations not under its port labor contracts but further uptown in the yards. But that is something I am not particularly familiar with.

Q. Do you understand that that occurs after the supply of Union men from the hiring hall has been exhausted?

A. I am not familiar with beyond our own responsibility.

Q. You are not familiar with that. I shall accept your answer. You are president of the Coast Association, plaintiff in this case. What position does Mr. Middleton, the gentleman sitting here—is that correct?

A. Correct.

Q. What position does Mr. Middleton hold?

A. Vice-president for the Northwest.

Q. He is a vice-president of the Coast Association?

A. Yes.

Q. He resides in Seattle?

A. He does.

Q. And is in a Seattle office here? That is his place of work?

A. That is correct.

Q. And is he also—do you know, an officer of the Washington Association?

A. He is. [156]

Q. Does he receive compensation from both Associations?

A. He does.

Q. One salary as vice-president of the Coast Association——

A. (Interposing) He receives one salary divided by agreement.

(Testimony of F. P. Foisie.)

Q. Let me put it another way, Mr. Middleton receives one-half of his compensation from the Coast Association, is that correct?

A. Yes.

Q. And the other half from the Waterfront Employers of Washington? A. No.

Q. From whom?

A. A part of the other half from the Waterfront Employers of Washington and the other part from the Waterfront Employers of Portland.

Q. Mr. Ringenberg's name has been mentioned from time to time. He lives in Seattle, too, doesn't he? A. Yes, he does.

Q. What connection does he have with the Coast Association?

A. He is the manager selected by the local trustees at the expense of the Coast Association responsible to the local trustees, administratively to the Coast Association on policy.

Q. Does any part of his compensation come from the local association?

A. If so, I am not aware of it. I think the local association gave him a small amount of pay for incidental supervision and central pay service and collective reporting. His salary comes from the Coast Association. [157]

Q. Is he an officer of the Coast Association?

A. No, he is a staff member of the Coast Association.

Q. Mr. Boyd here that you mentioned before is the secretary-treasurer? A. He is.

(Testimony of F. P. Foisie.)

Q. Of the Coast Association? A. Yes.

Q. Residing at San Francisco? A. Yes.

The Court: What is his office?

The Witness: Secretary-treasurer of the Coast Association with office and residence in San Francisco.

Q. I think in passing in connection with your testimony on direct examination you mentioned that the Waterfront Employers of Washington bear the expense of two things, collective reporting and central pay offices? A. Yes.

Q. And then I think you defined those adequately on your direct examination, but to be sure I understand, collective reporting is a process by which the employers in this community report for the benefit of all through a central agency certain various items such as Federal taxes and so on that have to be reported to governmental agencies?

A. Yes.

Q. And that central pay offices refers to a practice obtaining in this port under which all stevedores, regardless of who they happen to work for, go to one place and receive their pay periodically?

A. Yes. I would suggest longshoremen is the correct term, the stevedore being the—— [158]

Q. Pardon me; longshoremen. A. Yes.

Q. Can you tell me, do you know by what means those two operations are financed? Is that a 1% payroll tax

A. It is a percentage of the payroll tax. I think it is still 1%. It varies.

(Testimony of F. P. Foisie.)

Q. Which is payable to the Waterfront Employers of Washington, the local port association?

A. Yes.

Q. Now, in connection with Plaintiff's Exhibit 34, Section 1, Paragraph 1, "The provisions of this agreement shall apply to all handling of cargo in its transfer from vessel to first place of rest, and vice versa, including sorting and piling of cargo on the dock, and the direct transfer of cargo from vessel to railroad car or barge, and vice versa, when such work is performed by employees of the companies parties to this agreement." I want just one little definition in connection with that. The first place of rest as referred to in there, "first place of rest, and vice versa" means what? Can you explain that briefly to us?

A. I cannot because arbitrators in at least 25 cases have given us variable definitions for varying conditions. I could give you a definition, but it will not be perfect.

Q. Let me put it my way and see if I am wrong. I am not after any very fine technical definition, but is it not true that there is included within the meaning of that section operations which Mr. Dobrin mentioned as being dock operations as well as those that consist of actually taking cargo in and out of the hold of the ship? [159]

A. I can't give you an unqualified answer. At times it does include such work; at other times and frequently it does not.

Q. Let me put it this way. Your contract with

(Testimony of F. P. Foisie.)

the Longshoremen's Union does apply to certain work done on the dock as well as that done in the process of loading and unloading ships, does it not?

A. That is correct.

Q. Longshoremen are employed for that dock work just the same as they are for loading cargo from the dock onto the ship and vice versa?

A. For part of the dock work they are.

Q. Longshoremen do carry cargo in and out of a dock or warehouse, if I may call it that? That is a longshoreman's operation, isn't it?

A. If it is within the definition of longshore work. The longshoremen usually secure work on the dock. Dock workers do dock work, but they are used frequently in this longshore business by that agreement.

Q. But they are men obtained through this hiring hall?

A. So are all the other men on the dock.

Q. Any employee that you use on the dock moving cargo in and out of the warehouse is covered by this contract, Plaintiff's Exhibit 34?

A. Oh, no; oh, no.

Q. Well, let me put it this way. Any such employee who is moving that cargo has been or must be obtained through a hiring hall if they have men available? A. Entirely correct.

Q. Now, on that Plaintiff's Exhibit 34, the last time you had any extensive negotiations under such contract was 1940, [160] was it not?

(Testimony of F. P. Foisie.)

A. Oh, no. I have been with it all fall and winter and am occupied in it right at the present moment.

Q. Perhaps I didn't put it properly. There has been no contract negotiated since 1940, has there?

A. No, but there have been contract negotiations at great length.

Q. But no other contract has been produced since that time?

A. No, the present contract, as I testified, continues up to the time the War Labor Boards hands down its amendment.

Q. You mentioned, Mr. Foisie, the Maritime Industry Board. Are the members of that Board paid by the government?

A. Yes. I wonder if the Court would care for a further explanation.

Q. I think it can be gone into on redirect.

Mr. Dobrin: We are very technical, Mr. Foisie. I will ask you about it when the time comes.

The Witness: I beg your pardon. I don't know the procedure.

Q. I think perhaps you have covered the next matter. I had noted here your legal counsel in San Francisco is Mr. Gregory Harrison.

A. Correct.

Q. And whenever that name appears on copies of any minutes that have been put in as exhibits, that is the gentleman who is referred to?

A. He is counsel for the Association.

Q. You used the expression on your direct ex-

(Testimony of F. P. Foisie.)

amination "contracting stevedore." Is that a briefly definable phrase? [161]

A. Well, there are persons better able to define it than myself, but I would be glad to attempt it.

Q. Well, perhaps I had better put the question this way, sometimes steamship companies do their own stevedoring? A. That is correct.

Q. While they are so engaged you would not refer to them as contract stevedores?

A. Not as long as they are handling their own cargoes on their own ships.

A. A contracting stevedore, I would then assume, is one who makes a contract with a ship owner for the loading of the ship owner's vessel or discharging it? A. Yes.

Q. And there is a distinction, I believe, between a contracting stevedore and a terminal operator, isn't there?

A. Sometimes each does both kinds of contracting, in some instances.

Q. What you mean, in some instances a terminal operator may do work for the owner of a vessel, and to that extent would be a contracting stevedore?

A. He might load and discharge cargo to and from the hold or deck of the ship, and in that regard, even though a terminal operator, he would be doing contract stevedoring.

Q. I think we understand each other on that. Perhaps I expressed my question imperfectly. Do you know whether or not it is a fact that in this

(Testimony of F. P. Foisie.)

port there are terminal operators who are doing no contract stevedore work?

A. Yes. Just a minute. There have been so many changes here recently in their functions, I don't know of a terminal operator here who is called definitely a terminal operator [162] who does stevedoring in this port.

Q. But you would not expect those who are referred to as terminal operators in this port to do contract stevedoring?

A. We would expect they would not, but in recent years, as the stevedores have cut in on their field, that is something for them to say. I have nothing to say about that.

Q. Now, just a word on the 4c per man hour—

A. (Interposing) Oh, I owe you a correction. I am not clear, but I think Mr. Tait, who is a new member—I think he does both.

Mr. Dobrin: Both what?

The Witness: Terminal work and stevedoring.

Q. In testifying in connection with Exhibit 11, which is that exhibit referring to a charge of 4c per man hour—perhaps I had better read it; it is very short, so that we will both be talking about the same thing. It reads as follows: "Be it resolved that effective May 1, 1940 each port association levy against non-members an assessment of 4c per man hour for all longshoremen ordered and dispatched from the hiring hall to perform their work, and that all man hour assessments collected be remitted to the Waterfront Employers Association of the

(Testimony of F. P. Foisie.)

Pacific Coast as part of the general funds of said Association."

Now, I want to be sure there is no mistake about interpretation there. The purpose of that resolution, as I understand it, is to assess any person who is not a member of the Coast Association 4c per man hour for each employee he gets out of the hiring hall?

A. That is my understanding of it. [163]

Q. So that if the defendant in this case were to withdraw from this Coast Association organization and then to try to hire men out of the local hiring hall, it would be subject to that 4c levy?

A. I am inclined to think so. We haven't faced that issue, so I don't know how the directors would decide the matter.

Q. That is your impression and always has been of what it means?

A. Well, this impression I gathered from the stevedores who were active in promoting this resolution.

Q. You have been president of the organization since 1939?

A. Oh, yes, I was president at that time and present on that occasion.

Q. Now do you recall you described a ship gang in your direct testimony. As I understood the description, the men that you mentioned were the men who do the work of getting the cargo from ship side into the ship or out of the ship to ship's side?

A. That is it.

(Testimony of F. P. Foisie.)

Q. The men that you mentioned did not include any men who might subsequently move the cargo from the ship side in or out of the warehouse?

A. That is not a ship's gang here.

Q. No. And you did not in any answer in talking about ship's gang deal with any such men at all?

A. No, solely those men between the sling and the hold.

Q. I think you said, but I want to be sure I am clear on it, that prior to the formation of the Coast Association, a member like the port of Seattle or a local association was financed by a tonage assessment on the steamship companies [164] and a payroll assessment on other members?

A. Yes there were many modifications of that. One company, I recall, at different years paid a flat rate per month. The matter was loose. Those steamship companies that paid the tonnage tax—I think the stevedore didn't pay the payroll percentage on it. I am not clear because that is a dozen years back, and the system was never very clearly set forth in the local association; but that is my general recollection.

Q. Now, in justifying from a practical standpoint the tonnage tax, you said by way of example, I believe, that the shipper in Liverpool or London or Naples——

A. The ship owner.

Q. The ship owner, yes, might be interested in knowing what sort of a rate he would have to bear if he sent a ship into Puget Sound?

A. Yes.

(Testimony of F. P. Foisie.)

Q. That is not a problem which exists with respect to United States Army cargo. In other words, we don't have any London, Liverpool or Naples ship owner with respect to Army cargo?

A. Not abroad, but in Washington you do.

Mr. Dobrin: Which Washington do you refer to?

The Witness: D. C.; excuse me.

Q. Counsel asked you with respect to Plaintiff's Exhibit 32, which is a Minutes of Joint Meeting of the Committee of the Seattle and San Francisco representatives regarding assessments.

A. Was that meeting here in Seattle?

Q. No, the one in San Francisco on May 26, 1943, and you were [165] asked whether Mr. M. J. Weber, who was later identified as vice-president of the defendant corporation, approved the Joint Committee report that forms part of that exhibit. You asked, as I recall, to see the exhibit, looked at it and stated that he did. I want to ask you if in making that statement you gathered that information in any way from the exhibit or from independent recollection?

A. From the exhibit, because if there had been a dissenting voice, it would have been recorded by the secretary; but it confirmed my memory. We always have as a matter of routine minute keeping a record of dissenting votes or voices.

Q. In that connection may I call your attention to the contents of the minutes. (Reading) "The meeting adjourned at 12:00 noon. and reconvened

(Testimony of F. P. Foisie.)

at 2:30 p.m., at which time the Special Committee's report was read (copy attached and made part of these minutes). Upon motion of Mr. Stocking, seconded by Mr. James, it was agreed to submit the committee's report to the Coast Board tomorrow."

As I understand your answer now, you were stating that Mr. Weber did not object because there is no record of any objection contained in those minutes? A. That is my recollection, sir.

Q. Now, I want to go into another subject with you briefly, Mr. Foisie. You defined loading and discharging cargo as being, if I understood you correctly—correct me if I did not—the operation of taking the cargo from the dock and putting it in the ship or vice versa, taking it out of the ship and putting it on the dock. That to you was the loading and discharging of cargo? [166]

A. Yes.

Q. Do you mean that it is the process that the stevedore does, that is, the loading and discharging of cargo?

A. I will try again to define it as the handling of cargo by man and by mechanism in the area covered and in the distance traveled between sling and ship's hold or ship's deck in loading, and the reverse process is discharging. That may be to dock direct; it may be to barge alongside.

Q. Yes, I understand all that. But what I am interested in is something different. If the contracting stevedore was engaged in the operation you just described, would he be the only one whom

(Testimony of F. P. Foisie.)

you would say in this way was loading or discharging cargo? A. Yes.

Q. Wouldn't the ship owner in some circumstances say the loading or discharging of the cargo of a vessel would be at such and such a wharf?

A. Oh, yes.

Q. In other words, when you are referring solely to the process of putting it in and taking it out, you recognize that the ship owner still may refer to it as I just did?

A. Yes, because it is for his account and under his direction with the master and the mates in the immediate supervisory control.

Q. All right. Then, as I understand, you say this tonnage tax was on the loading and discharging of cargo? A. That is correct.

Q. Might it not be just as well on the steamship company? A. It is frequently so assessed.

Q. Now, when your steamship company is doing this work through [167] a contract stevedore, wasn't it always the understanding—at least prior to 1940 that the steamship company member of the plaintiff Association was the party that was to pay that tonnage tax? A. Oh, no.

Q. Well, let me correct it. I recall that you said there were instances where it was not done. Wasn't that substantially the universal practice?

A. It was substantial; it was by no means universal. It has been growing steadily throughout the years. But there were many cases, early particularly and some remaining, where the steamship company

(Testimony of F. P. Foisie.)

doesn't pay the tax; but in the majority of cases it does; largely so and more and more year by year.

Q. Let's get down to a clear basis. I am talking about member steamship companies. Are we clear on that? A. That is right.

Q. Isn't it true that in those instances in which the member steamship company did not pay the tonnage tax on a cargo loaded in its own vessels, that the matter was handled by special agreement between that steamship company and the contracting stevedore?

A. There were many agreements of contract between the two about which we would know nothing. All we know is that we collect on all of the cargo handled and check to be sure that all the tonnage handled is reported and paid for, but it is paid for variously.

Q. Well, you don't collect twice on the same cargo?

A. Unfortunately, I am sorry to say, we have, but we have always corrected it where we collected twice. [168]

Q. It wasn't the purpose of any of your resolutions to collect twice?

A. You are entirely correct.

Q. What is that?

A. You are entirely correct.

Q. How do you determine then, when you have a member steamship company and a member contracting stevedore, which of them should pay the 2½c?

(Testimony of F. P. Foisie.)

A. Either one or the other would notify us.

Q. As far as the plaintiff Association is concerned, you were indifferent as to which one of them paid you?

A. Entirely so and still are.

Q. By the way, you don't know of any instance of the defendant having ever paid 2½¢ a ton for any member steamship company, do you?

A. I was trying to recall that this noon, and I don't recall any. The Japanese lines were members. I believe in all instances their local accounts were members. I don't recall any instance, and I tried.

Q. Can you give me an idea of what percentage of the tonnage tax has ever been paid by contract stevedores on account of cargo loaded by them for member steamship companies?

A. I could give you instances.

Q. No, I would just like an approximation of a percentage.

A. I couldn't other than to say that it was a minority, but it was not a small minority. It was a substantial minority, but it was never anything like half.

Q. Never anything like half? A. No.

Q. Would it be a quarter? [169]

A. It probably was less than a quarter even in the early days.

Q. And decreasingly less all the time?

A. Yes. There are some companies, of course, who continue to pay it today.

(Testimony of F. P. Foisie.)

Q. We have got it down to probably less than a quarter. Would it be 10%?

A. Oh, it would be more than that.

Q. Now, you defined handling as the conveying of the cargo, as I understood it, to the interior of the warehouse from the side of the vessel and vice versa?

A. Anywhere on the dock.

Q. Anywhere on the dock is handling?

A. That, I might explain, is a more or less established term in port cargo handling. It attaches to so many factors of rate making.

Q. Are these forms of expression at all hard and fast?

A. Pretty substantially agreed upon. For instance, there is an assembling and discharging—I think that is the tariff rate. I think that is the terminology that attaches to all handling between ship's side and place of rest. And handling cargo to cars and from cars is also a standard term. Handling attaches to handling cargo on the dock.

Q. In California, by and large, your stevedore operations consist of one operation combining the dock work and what you define as loading or discharging?

A. There is a diversity there, and more of what you describe there than here.

Q. Most of the work is done in that fashion down there?

A. Well, there is, for example, about 70 of what we call [170] shore to ship gangs down there out of 265. That will be evidence of shipside delivery.

(Testimony of F. P. Foisie.)

Q. So that by rapid calculation there will be 195 ship gangs and 70 shore gangs?

A. Long gangs we call them and the other shore gangs.

Q. Now, stevedore who is carrying on that operation, if I may use the term combined operation—you understand me? A. I do.

Q. —you would understand him perfectly if he said he was loading and discharging a ship. He wouldn't have to add, "I am also handling cargo"?

A. Oh, no, as long as he was loading or discharging the ship.

Q. I am including work by a skilled dock worker.

A. No, dock work has a different meaning. Car-loading is the term used down there for what you describe as dock work. It would very definitely mean that the vessel was loading or discharging. If he were doing it as a combined operation, it would include either to car alongside or the first place of rest or from last place of rest as those terms are variously described.

Q. I may be quibbling a little, but what I meant to inquire about was that in common parlance a man doing the entire operation might, if you asked what he was doing, simply say, "I am loading such and such a vessel at such and such a pier"?

A. That is right.

Mr. Dobrin: Just a minute. I move to strike the answer and object to the question as immaterial.

(Testimony of F. P. Foisie.)

Mr. Gose: He defined these things on direct examination.

The Court: It has already been asked and answered. It will stand as is. Objection overruled and motion to strike denied.

Q. I have asked you about the combined operation. Is split operation customarily used to describe a situation where one party does the dock work and one party does the work of putting the cargo in and out of the ship?

A. I don't think so. I mean I am not accustomed to the use of that term "split".

Q. Well, permit me to use it then.

A. Gladly.

Q. Let me ask you, is the operation such as I have described frequently referred to as a split operation in the Port of Seattle?

Mr. Dobrin: Just a minute. Objected to unless he tells what kind of an operation he is talking about.

Mr. Gose: I am going to.

Q. In the sense that a stevedore here may unload the cargo from shipside in or out of the vessel and someone else, either terminal operator or another stevedore, may handle the same cargo on the dock.

A. It is my recollection that the only time or the occasion when this term "split operation" arose was in the discussion of the Seattle group carried to San Francisco about this very problem you are men-

(Testimony of F. P. Foisie.)

tioning. That is my only recollection of the use of the term.

Q. But you do know cargo is handled in that fashion in this port? A. Yes. [172]

Q. And when that is done it is the claim of the plaintiff that the 2½c is payable entirely by the member who handles or unloads the cargo in and out of the ship?

A. Whoever loads or discharges the ship has the obligation to pay the 2½c, whether it be the steamship company or the stevedore doing that loading or discharging operation, and no other.

Q. Do you know that sometimes the party that works the dock beside that operation is also a stevedore member of the plaintiff association?

A. That, I think, is an entirely recent development. It was not a case formerly. I understand it is the case to a substantial extent now.

Q. And where it is the case now where the person working at the dock is a stevedore member of the Association, he is not, under the claim of the plaintiff, required to bear any part of the tonnage tax? A. That is correct.

Q. Would it be true that on other occasions the person who worked the dock would be a member terminal operator? A. Yes.

Q. And likewise in that case such a member terminal operator would not be expected to pay the Coast Association any part of the tonnage tax?

A. No part of his dock operation. Neither that

(Testimony of F. P. Foisie.)

nor the earloading calls for the payment of a tonnage tax.

Q. And in the instance I have put, whether of a stevedore member or a terminal operator member working the dock, or both, in such cases they would be using men employed from the hiring hall, would they not? [173]

A. Yes. In the latter case it is individual men and in the former case it is the ship's gang.

Q. Showing you Plaintiff's Exhibits 41, 42, 43 and 44, may I ask you whether in the column marked "Dock" which shows, as I understand, the number of man-hours of work performed by longshoremen on the dock, whether that represents work done by longshoremen on account of these dock operations that I have just referred to for which it is claimed that no tonnage tax is chargeable?

A. Yes, either for the stevedore or the terminal company or the steamship company doing the work on the dock.

Q. So, to put it this way, taking Plaintiff's Exhibit 42, it shows total man-hours for the Puget Sound District for the year 1944, Ship 3,554,026. Now, the work done in those man-hours would be in the unloading of tonnage for which the 21½¢ a ton was payable? A. That is my understanding.

Q. And, conversely, the 3,097,928 hours shown under the column "Dock" would be work done on the dock by longshoremen for which nothing com-

(Testimony of F. P. Foisie.)

parable to the tonnage tax is payable to the plaintiff Association? A. Yes.

Q. In discussing the benefits of this organization to the members perhaps or to the defendant—I am not clear which—you said that it occasionally gave financial backing or aid to its membership. It has never done that for the defendant?

A. I recall no instance where the defendant was involved in a tie-up which required the financial support of the Association. I am not so sure about a steamship tie-up for [174] one of these companies on a group basis. My recollection is now that I was in on an authorization to reimburse; but the statement would still be true that that would not attach to the stevedore. I know we did defend and go through court proceedings and bore the entire expense for a number of such ships.

Mr. Gose: I would like to have this marked as Defendant's Exhibit A for identification.

(Document dated February 2, 1943, and bearing signature F. P. Foisie, marked Defendant's Exhibit A for identification.)

Mr. Gose: Counsel has agreed that Defendant's Exhibit A need not be identified, that it is what it purports to be, a copy of a communication to the Budget and Finance Committee of the Waterfront Employers Association of the Pacific Coast under date of February 2, 1943, by Mr. F. P. Foisie; and may it be agreed also in connection with the identification that the original in the minute book of the

(Testimony of F. P. Foisie.)

corporation is signed by Mr. Foisie? Would you like to examine that?

Mr. Dorbin: Yes, we agree that it was signed.

Mr. Gose: I am offering this now. I would like to have the Court examine.

The Court: Exhibit A is offered. Is there any objection?

Mr. Dorbin: Yes, I am objecting.

The Court: All right.

Mr. Dobrin: We only agreed that he did not have to identify it further; but I object to it on the ground that this type of letter from the president of the Waterfront [175] Employers Association of the Pacific Coast to its Budget and Finance Committee setting forth, as it does, certain statements by Mr. Foisie, can only be admissible for impeachment of some contrary testimony that he offers here. It could not be offered to bind this corporation at all because Mr. Foisie has no power to do that. It would be admissible for impeachment but not otherwise.

Mr. Gose: If the Court please, this is a full review from the minutes—it is a full review by Mr. Foisie to the Budget and Finance Committee, taken from the minute book of the plaintiff corporation, explaining as it appeared to him then, as I apprehend, what the situation was with respect to this whole tonnage assessment proposition. I think if your Honor would examine it, you can perhaps determine its admissibility.

The Court: You are objecting on what ground?

(Testimony of F. P. Foisie.)

Mr. Dorbin: I am objecting upon the ground that a written statement of the president of this Association to its Budget and Finance Committee cannot in any way bind the plaintiff in this case in any respect by whatever is said therein, and that it can only be used for the purpose of impeaching the witness on the stand by showing that at some other time and place he said something different than he testifies to here.

The Court: In view of the objection, I think at least you should ask the witness whether or not he wrote any such letter.

Mr. Dorbin: We don't deny that he wrote it.

The Court: Well, I still suggest that to counsel.

Q. Let me show you this Defendant's Exhibit A, Mr. Foisie, [176] and ask you if you did write such communication to the Budget and Finance Committee of the plaintiff corporation on February 2, 1943?

A. It looks very familiar. I assume it is a letter I wrote. I have no reason to doubt it.

Q. Would anything that you stated in there be untrue as you then thought the facts to be?

A. I trust not. It might be an error, but I hope they were true.

Q. That represents what you thought was a statement of the situation regarding these tonnage taxes at that time?

A. A full page statement, yes.

Mr. Gose: I renew the offer. It is a statement

(Testimony of F. P. Foisie.)

at that time as to what his position was with respect to it.

The Court: Let me see it. (Examines same.)

Mr. Dobrin: I renew my objection because you have to test this letter by all the factors which were then present for the Budget and Finance Committee to consider.

The Court: Well, I will read the communication and then consider the objection.

Mr. Gose: If your Honor entertains any doubt, I would like to be heard for a minute more.

The Court: Well, I will say I entertain doubt.

Mr. Gose: If your Honor please, this is a statement by the president of this corporation not only reviewing the situation at that time but expounding certain practices that have been followed by way of practical interpretation of the resolutions that have been undertaken [177] there. This witness testified already at great length as to his familiarity with the functions, purposes and doings of the corporation; and I think, as president, it is competent to show what his statement in writing was at a preceding time. If your Honor thinks it admissible only for impeachment purposes, there are two or three features in it that I would like to employ for that purpose.

The Court: Well, on the basis of my reading this exhibit, it would seem to me that, technically, Mr. Dobrin's objection would be sound if the witness had been very strict in his direct examination. It must be remembered that the witness did cover a

(Testimony of F. P. Foisie.)

lot of ground. Some of it was solicited by questions and some of it was volunteered by a willing witness. Therefore I am somewhat doubtful as to whether under all the circumstances it is admissible; and I will solve the puzzle for the present by reserving ruling as to this Exhibit A for identification.

Mr. Gose: In that event I would like to ask another question about it, if your Honor please.

The Court: You may.

Q. Did you ever state, Mr. Foisie, at any time prior to today that the 21½c per ton assessment was, prior to the war, paid by the steamship members, with the contract stevedores as associate members undertaking to collect the same assessment from non-member steamship companies and in all cases doing so?

A. I am sorry, but that is a bit too lengthy. I got lost on it. [178]

Mr. Dobrin: If you will show him to what you refer.

Mr. Gose: It is Paragraph 3, page 1 of this Defendant's Exhibit A for identification. I didn't think I was supposed to refer to that.

The Witness: I am sorry; I didn't follow it. I thought you started off on steamship companies and switched to non-members.

Q. If you will follow me, Paragraph 3 of the document you have before you, did you ever state in writing prior to today that "The 21½c per ton assessment was, prior to the war, paid by the steam-

(Testimony of F. P. Foisie.)

ship members, with contract stevedores as associate members undertaking to collect the same assessment from non-member steamship companies and in all cases doing so''?

A. I did say that. The letter would be plainer if I said the same rate of assessment——

Q. (Interposing) In any event, as I have read it is the way you did state it?

A. That is right.

Q. And that was on the second day of February, 1943?

A. That is right.

Q. That was in a written statement to the Budget and Finance Committee of the plaintiff association?

A. That is correct.

Q. Did you further state in writing on the same date——

Mr. Dobrin: Just a minute. It is not my understanding that that is the way to ask an impeaching question. You first ask the witness a question, and if you get an answer that you are going to impeach him on, you [179] go ahead and impeach him. But this is not the way——

Mr. Gose: (Interposing) If the Court please; he has testified——

Mr. Dobrin: He is putting this in piecemeal.

The Court: You could read each sentence of this letter and ask him if he said it, and if he said he did, it is in evidence, and if he says he didn't, you could introduce it——

Mr. Gose: (Interposing) That is exactly my——

The Court: ——but unless this letter is ad-

(Testimony of F. P. Foisie.)

missible now, I am not going to make it admissible by asking him if he didn't write a certain thing in a letter. Any previous written statement could be put in evidence on that theory.

Mr. Gose: Yes, your Honor; and I conceive if he denies it, I am entitled to introduce it.

The Court: You could ask him if he wrote a letter to somebody about a purely personal matter that had no connection with this suit at all. You could ask him if he wrote it, and if he said yes, it could be read sentence by sentence. You could produce a letter and ask him concerning every sentence in the letter. So any immaterial matter on your theory could be put in evidence. I don't subscribe to your theory. Objection sustained. If you can show me where this letter is impeachment of what he has said, it may help me in determining what my ruling should be, which ruling is now reserved.

Mr. Gose: Very well. It was my thought that with respect to your statement that any letter could be put in evidence in this way, it would always be open to the [180] objection of immateriality and irrelevancy; but I will conclude this matter and rest on the Court's reservation of ruling.

The Court: It is about 4:30.

Mr. Gose: I think I am through with this witness if the Court please, but I believe he expects to be in court anyhow, and I would like to reserve the right to recall him as my own witness.

The Court: All right. The witness will be in

(Testimony of F. P. Foisie.)

court Tuesday morning at 10:00 o'clock. Now, gentlemen, it is assumed that cross examination is finished with this witness. I would hate to wager too much on that because anyone who has from Friday evening until Tuesday morning, usually thinks of a lot of questions. But assuming that counsel's idea would be followed, what is the chance of finishing this case Tuesday?

Mr. Gose: I will make a statement on that, that if Mr. Dobrin——

Mr. Dobrin: (Interposing) I am sort of the moving one. I think, so far as I know now, and I am subject to the same difficulty, that I am going to have until Tuesday morning too, but as it looks now, I have only one witness——

The Court: One more?

Mr. Dobrin: One more, and that is Mr. Boyd, on matters which ought to be very short. But I suppose I will be longer than I think. He ought to be done by both of us within an hour.

The Court: It may be that is true, but I am going under the theory that Mr. Dobrin will think of a lot of [181] questions between now and Tuesday morning.

Mr. Dobrin: I have got some redirect. I know all that is going to take some time.

The Court: I am going on the theory that Mr. Dobrin will think of a lot of questions that he doesn't have in mind now. What is the chance of your finishing by Tuesday?

(Testimony of F. P. Foisie.)

Mr. Gose: I think the Court can depend fairly well that I have completed with the cross examination of the witness, and the time I consumed with my cross examination of Mr. Foisie will be in ratio to the time consumed by counsel on the other witness and my cross examination.

The Court: What about your case in chief?

Mr. Gose: I think I can put on—I have no way of measuring Mr. Dobrin's cross examination—but I think I can put on whatever testimony I have in the space of an hour and a half.

Mr. Dobrin: May I ask this question? I anticipate, although maybe I shouldn't expect it, when the plaintiff rests the defendant may make a motion. And if so, that involves another complication because we may stand here arguing about that—

Mr. Gose: I will not undertake to obligate myself not to, but it is not my present expectation to make such a motion because I think it would be better to get everything before the Court and get it settled finally once and for all.

The Court: Well, with the plaintiff's case we are holding our own. We are a good deal like the man starting off for a destination and the mileposts say it is [182] ten miles away. After he has gone five miles it still says ten miles and the man thinks at that time he is holding his own. As I remember it, yesterday the plaintiff had just one witness. Now they have another one.

Mr. Dobrin: We have always had two.

The Court: Oh, you have had two. It was my misunderstanding.

(Further colloquy.)

(Whereupon a recess was had herein until 10:00 a.m., March 27, 1945.) [183]

Seattle, Washington

March 27, 1945, 10:00 a.m.

(All parties present as before.)

Mr. Gose: In connection with the offer of Defendant's Exhibit A, upon which you Honor reserved ruling the other afternoon, there was a good deal said at the conclusion of that session about the procedure for impeachment. I wish it understood that in making that offer the thought of impeachment was entirely secondary and still is, but the offer is made rather of a document as an official document of the plaintiff. That is one of the plaintiff's original records from its minute book. I wish to develop that thought a little further with a few questions addressed to this witness.

F. P. FOISIE,

resumed the stand for further examination and testified as follows:

Cross Examination (Resumed)

By Mr. Gose:

Q. Mr. Foisie, does the plaintiff corporation have a Budget and Finance Committee?

A. It does.

(Testimony of F. P. Foisie.)

Q. And had such a committee in February of 1943, did it not? A. And still has, yes.

Q. It did have at that time? A. It did.

Q. What was the origin of that committee, that is, how did it come into existence, do you know?

A. By appointment of the directors from the beginning of the [184] Association.

Q. Who designates the members of that committee? A. The directors.

Q. The directors. And they did so in February, 1943? A. Yes.

Q. What are the functions of that committee?

A. To develop the budget through the—beginning with the port manager's budget through the local trustees, which is sent to the treasurer of the Coast Association, and consolidates the administrative budget at San Francisco which is submitted to the Budget and Finance Committee——

Q. Does that committee have anything to do with the manner of tonnage assessments?

A. Yes.

Q. It does consider that question and make recommendations to the Board, does it not?

A. It did at the time of the one change in the rate. It does in all preliminary matters before the Board designates it and decides.

Q. That Budget and Finance Committee holds meetings which are attended by the secretary of the plaintiff corporation, does it not? A. Yes.

Q. And it is the practice of the secretary to prepare minutes of what transpires at those meetings?

(Testimony of F. P. Foisie.)

A. Yes.

Q. And such minutes are placed in the minute book of the plaintiff corporation, are they not?

A. Yes.

Mr. Gose: I will ask to have this document marked [185] Defendant's Exhibit B for identification.

The Court: There has been no other exhibit except A?

Mr. Gose: No. Counsel has agreed as to the authenticity—is the authenticity of this document agreed to?

Mr. Dobrin: Yes.

Mr. Gose: That is certain minutes taken from the minute book of the plaintiff corporation?

Mr. Dobrin: That is correct.

(Minutes of meeting of Budget & Finance Committee of Waterfront Employers Association of the Pacific Coast marked Defendant's Exhibit B for identification.)

Q. I want to show you Defendant's Exhibit B for identification and ask you if those are minutes of the meeting of the plaintiff's Budget and Finance Committee held on February 2, 1943.

A. Those are.

Mr. Gose: I wish to offer Defendant's Exhibit B for identification in evidence.

The Court: Is there any objection?

Mr. Dobrin: If the Court please, the plaintiff objects to the offer of Exhibit B, and I want to specify clearly——

(Testimony of F. P. Foisie.)

The Court: (Interposing) Just let me read it first so that I may understand it.

Mr. Dobrin: Very well.

(Court reads Exhibit B.)

Mr. Dobrin: The objection to that is similar to the objection to Exhibit A, your Honor. My position is [186] this, the Defendant in this case is bound by acts of the Board of Directors of the plaintiff; so is the plaintiff. The acts of subordinate bodies, whatever they may be, are immaterial to any issue in this case, such as the act of this committee or any other committee or any other individual, be he an officer or otherwise of the plaintiff association. It is immaterial to our position.

The Court: As I remember your objection to Exhibit A, it was, among others, that it was improper cross examination.

Mr. Dobrin: No, I didn't make that objection.

The Court: Well, I may tell counsel I am extremely doubtful of this being proper cross examination.

Mr. Gose: Oh, I have no question on that; it isn't in the character of proper cross examination, and I so stated when I put in Exhibit A, but it being the only document I wished to examine this witness about, I thought it might be more expeditious.

The Court: If it is specifically understood the objection of improper cross examination is not

(Testimony of F. P. Foisie.)

raised, I will overrule the objection to Exhibit B, and B is admitted.

(Document previously marked Defendant's Exhibit B for identification was received in evidence.)

Q. Mr. Foisie, may I call your attention to the statement appearing right toward the beginning of this Exhibit B which states, "Mr. Foisie presented under date of February 2 a letter addressed to the Budget and Finance Committee regarding the situation in the Northwest, copy of which is attached and made a part of these minutes." Is Defendant's Exhibit A the letter which is referred to [187] in the portion of Defendant's Exhibit B which I have just read? A. Yes.

Q. Can you tell us, Mr. Foisie, what the purpose of Defendant's Exhibit A, the letter to the Budget and Finance Committee, was?

A. It was to spread before the Budget and Finance Committee as comprehensive a picture as I was equal to in order to show the many phases of this situation that had developed by discussion, largely in the Northwest, and between the Northwest and San Francisco.

Q. And it was given to them in order to give them information on which they might act, was it not? A. Yes.

Q. And they did act upon such information, did they not? A. They did.

Mr. Gose: I now offer Defendant's Exhibit A

(Testimony of F. P. Foisie.)

as being definitely tied in with Defendant's Exhibit B, being information submitted by the president of the corporation to the Budget and Finance Committee as the basis for its action and upon which the witness states it did act. It completes the picture with this Exhibit B.

Mr. Dobrin: I renew the objection.

The Court: Well, counsel, it might seem logical to admit A because it is referred to in Exhibit B, but that doesn't necessarily follow. If Exhibit B, the minutes, had recited among other things that Volume 3 of the Encyclopedia Britannica had been referred to, I wouldn't feel compelled to admit Volume 3 of the Encyclopedia Britannica in evidence. I am not able as yet in reading Exhibit A for identification to find anything that is properly material there. Now, if you can point it out to me——

Mr. Gose: Very well. If the Court please——

The Court: It might change my position.

Mr. Gose: My thought has been as counsel introduced a good many documents, and I haven't objected to them, but my thought has been, your Honor, there is quite a range of issues in this case, and in a trial by this Court if some points plaintiff advances or the defendant advances do not appeal to your Honor, your Honor is not compelled to consider them in arriving at a conclusion. I understood in reserving your ruling last Friday that was probably what your Honor had in mind. There are a number of points in this Exhibit A, which was

(Testimony of F. P. Foisie.)

given, I take it, officially to the Budget and Finance Committee, which touch upon issues in this case from the standpoint at least of the defendant. Among other things, the president of the corporation here reviews the instant situation, the existing situation up and down the Coast with respect to this tonnage assessment. It is a background of the parties as they were at that time laying it before the Budget and Finance Committee of this corporation. Not only that, but it appears from another exhibit in evidence, namely one passed by the Board of Directors on February 25, 1943, which was again pursuant to action by the Budget and Finance Committee, that certain action was taken at that time, very shortly after this deadlock, toward the consideration and commencing of suit against the defendant. This ties in as an historical subject in the chain of developments in this whole matter. I think [189] that in showing what the construction was of the powers of the organization we are entitled to show what was done over a long period of time. One of the contentions, if your Honor please—and this is my ultimate reason for offering this exhibit—one of the contentions of the defendants is this, that by every practical consideration over a period of time from the organization of this corporation up until the outbreak of the war it was recognized that the taxing power of this corporation extended only to voting members. That was common ground. Certainly, as we—

The Court: (Interposing) Just a minute. I

(Testimony of F. P. Foisie.)

recognize what the witness has said. Does that letter show that?

Mr. Gose: It shows the 2½¢ per ton assessment was prior to the war paid by the steamship members, with contracting stevedores as associate members undertaking to collect the same assessment from non-member steamship companies and in all cases doing so. Now, my point is this, that as far as collecting from the non-member steamship companies is concerned, that rested entirely upon a special resolution passed in 1940, in May, with a proviso that the contract stevedores should consent to it and should endeavor to get an agreement from the non-member steamship companies to pay the tax, but prior to that time and independently of that resolution, the practice had always been, as the paragraph I have just read indicates, that the voting member steamship company was the sole party that paid the tax on its own cargo. Now, I think that particular statement is certainly [190] definite evidence of that particular fact, and it is a vital fact for our position. If your Honor should think that the chain of evidence on that subject is not sufficient or does not complete the chain, your Honor does not have to honor the particular exhibit. But I think we are entitled to have it in to give us the argument that on occasion after occasion it is said the steamship companies shall pay all tax on their own cargo and that the only obligation of the contracting stevedore is to pay on non-member steamship companies, which I may say is an entirely

(Testimony of F. P. Foisie.)

different thing from what we have got in this case. This is Army cargo which can hardly fall in the category of a non-member steamship. That is my thought; it is to develop this additional link in the chain so that we will have all the various expressions that were officially made on this question of what the responsibilities of the parties were.

Mr. Dobrin: If your Honor please, I don't think historical matters are of any particular moment in any event. This witness testified on cross examination as well as on direct examination that from the beginning of this Association the stevedores paid tonnage assessments. In 1942, irrespective of whether that had or had not been the method—in 1942 the Board of Directors of the plaintiff Association specifically provided that as to the Army and Navy and War Shipping Administration tonnage the stevedores were to pay the tonnage. That is a resolution which is in evidence; and pursuant thereto the defendant in this case paid and he is being sued for what he has not paid. Now, if on some question of debate by [191] the defendant as to what historically happened before 1942 you admit this letter, which discusses a great many things other than that, I am frank to say that on redirect examination I have got to go through this letter paragraph by paragraph and find out if in fact in every instance every remark he made there states a fact, because as your Honor will readily realize, this letter was written with only one purpose, that is, put in generally before this Budget

(Testimony of F. P. Foisie.)

Committee Mr. Foisie's review in a general way of what had occurred up to that time, but was never intended to be detailed and specific as to all factual matters such as are being raised in this case. So we would have to go through every one of those paragraphs and find out whether everything he said in there sets forth all the facts. In other words, if it is a general statement, what were the exceptions? I don't think it adds anything, what Mr. Foisie said on February 2, 1943, to this Budget Committee, which is what he understood. The history of prior years doesn't enter into this case one way or the other.

Mr. Gose: If I may answer.

The Court: (Interposing) Well, I think we have had both sides now.

Mr. Gose: There is only one point—

The Court: (Interposing) We have had much argument concerning this matter. I am afraid after you answer that counsel would wish to answer again, which he would have a right to do. As I read this Exhibit A,—I thought that I read it carefully, but I gues I must not have; it didn't seem to me that there was anything of great [192] moment in the letter that disagreed with what the witness had said. But in view of Mr. Dobrin's statement as to what he said and in view of counsel's statement as to what the letter says, it would seem to me that is probably is material. Counsel's argument has without question made Exhibit A as material as much of the matter that the plaintiff

(Testimony of F. P. Foisie.)

has put in evidence. The defendant, however, has made no objection, and it is not the Court's function to become meticulous about keeping out evidence if the parties on both sides are willing that it go in. I am inclined to admit this evidence for what it may be worth, and Exhibit A is admitted for what, if anything, it is worth. Objection of plaintiff overruled.

(Document previously marked Defendant's Exhibit A for identification was received in evidence.)

Q. On direct examination on Friday you testified something about the Army in San Francisco,— I think you said it was now contracting some of its stevedore work out to contracting stevedores. That was the substance of it, wasn't it? A. Yes.

Q. When did it start doing this contracting out to stevedores?

A. My recollection is about a year and a half ago.

Q. At the present time, however, the Army is directly employing stevedores in the Port of San Francisco, is it not?

A. It is, and it is also contracting some of its work.

Q. To what extent relatively is the Army now employing stevedores directly as compared with the amount of work that is being done with contract stevedores? [193]

Mr. Dobrin: Objected to as immaterial and improper cross examination.

(Testimony of F. P. Foisie.)

The Court: Overruled.

A. I would have to give a guess.

Q. I only want an approximation.

A. The secretary-treasurer will know better. The Army does a third of the work roughly in San Francisco. The California Stevedoring & Ballast won't do more than a fifth as much as the Army. It will do a substantial volume. I mean of Army work by California Stevedoring & Ballast it will do about a fifth.

Q. I think we are lost here somewhere. There is a total amount of Army cargo that moves through the Port of San Francisco?

A. A third of the total work of the port is by the Army, and a fifth——

Q. (Interposing) That is not exactly what I asked you. How much Army cargo is handled by longshoremen who are employed directly by the Army?

A. A third of the work of the port is handled by the Army directly. The California Stevedoring & Ballast Company in the work which it does for the Army—it does work for others—it is about a fifth as much as the Army does directly.

The Court: Is the fifth in addition to the third?

Mr. Gose: Where I am having a little trouble is on this, you say a third of the work of the port. Do you mean a third of every ton of cargo of every type that goes out for everybody in San Francisco, or are you talking about one-third of the Army cargo? [194]

(Testimony of F. P. Foisie.)

The Witness: I am sorry my fractions are not clear. There is 100% cargo of the port; the Army handles itself a third of that, the Navy a little more than a third and W. S. A. the balance.

Q. I am interested only in this third for the Army at the present moment. Directing your attention to that alone, how much of that, what percentage roughly is that Army cargo which is handled by stevedores which the Army itself employs directly rather than through a contracting stevedore?

A. Well, I would have to state it by fractions. A third of the work of the port constitutes 100% or the work done by the Army directly. The California Stevedoring & Ballast will do 20% as much as the Army does itself. I don't know how to make it plainer.

Q. I am trying to direct your attention—I think there is no question——

The Court: (Interposing) Just a minute. It would mean about 33% for the Army and approximately 7% by the company you mentioned of the work of the port.

Mr. Dobrin: Yes.

The Witness: Correct.

Q. I am not interested in what the California Stevedoring & Ballast Company is doing. All I am trying to find out is just one thing by this question that may lead to another series of questions. The Army does directly employ stevedores

(Testimony of F. P. Foisie.)

to handle its own cargo in the Port of San Francisco, does it not?

A. It does. I assume you mean longshoremen.

Q. Longshoremen. Pardon me. The Army also has some cargo [195] now handled through the Port of San Francisco by contracting stevedores?

A. That is correct.

Q. Now, what are the relative proportions of those two methods of handling Army cargo? How much does the Army handle through longshoremen directly employed by it, and how much of its work does it do through contracting stevedores?

A. The Court has stated it, I can't do it any better. That is a very good statement by the Court.

Q. I am not clear on it yet. Perhaps I am being obtuse about it. Does the Army handle 50% of its own cargo in the Port of San Francisco?

A. It handles something over 80% of its own cargo.

Q. That is what I have been trying to develop; and the remainder by contract stevedore?

A. Right.

Q. How does that 80% approximation compare with what the situation was say a year ago?

A. There is no great difference.

Q. No great difference? A. No.

Q. Is the army paying the tonnage tax on that 80% of the cargo handled by it where it directly employs longshoremen? A. Not yet.

Q. And have never done so?

A. That is correct.

(Testimony of F. P. Foisie.)

Q. With respect to Mr. Joseph Weber, whom we discussed the other day, he is, of course, not the same man as M. J. Weber who is sitting over here? [196]

A. Father and son.

Q. And Mr. Joseph Weber is now dead, as you know?

A. Yes.

Mr. Gose: I think that is all.

Redirect Examination

By Mr. Dobrin:

Q. Referring to Mr. Joseph Weber, deceased, did he attend the quarterly meetings of the Board of Directors during the time he was an associate director?

A. Always.

Mr. Gose: If I may raise a point, pardon me. I don't like to interrupt, but I don't think the words "associate director" are strictly correct.

Mr. Dobrin: You used it, and I am just using it.

Mr. Gose: I think the by-laws refer to the person as a representative.

Mr. Dobrin: He was an ex officio member of the Board of Directors.

Q. Is that correct?

A. That is correct.

Q. Are the ex officio members of the Board of Directors provided for by the by-laws commonly referred to in this Association as associate directors?

A. Correct.

Q. And as an associate director, did he attend the quarterly meetings of the Board of Directors?

A. Always with, I think, only one exception; there may have been two.

(Testimony of F. P. Foisie.)

Q. Now the Board of Directors of the plaintiff Association [197] meets four times a year in what are referred to as quarterly meetings?

A. Yes.

Q. One of those is an annual meeting?

A. Yes.

Q. And at those quarterly meetings do these associate directors attend? A. They do.

Q. As a matter of practice, in these associate meetings do the associate directors make motions?

A. Yes.

Q. Do they vote? A. Yes.

Q. And have they always done so from the beginning of the Association up to and including the present time?

A. I recall one exception.

Q. And what was that exception?

A. There was a difference of opinion with regard to the rate of increase to be paid walking bosses. The Seattle ex officio directors wanted to increase the rate beyond that of the rest of the Coast, one of the directors, George Albin, got up and asked if the associate directors had the right to vote, and I told him that I regretted he asked the question because we never raised the issue, but since he did ask the question, I was obliged to tell him they didn't have the right to vote.

Q. Now, at any time in meetings of the Board of Directors and in any business transacted by the Board of Directors since the beginning of this Association, would the question of whether an associate

(Testimony of F. P. Foisie.)

director had a right to vote or [198] didn't have a right to vote affect any action which has ever been taken by the directors?

Mr. Gose: Oh, I will have to object to that question, what the action of the Board of Directors would have been is something within their knowledge and not within the knowledge of this witness. That would call for a conclusion very obviously.

Mr. Dobrin: No, it doesn't call for a conclusion at all.

Mr. Gose: There are 17 members of the Board of Directors and this witness can't sit here and tell us what would determine the decision of those 17 members and each and every one.

Mr. Dobrin: He can tell us whether there was ever a division in the Board in which the question as to whether an associate member had a vote or didn't have a vote would have made any difference. That is a mathematical calculation, and he knows whether it ever occurred, and he can testify to it.

The Court: Let us hear the question.

(Question read.)

The Court: Well, I think that before this question is proper over objection, that there must be some foundation laid as to what knowledge he has, what investigation he had made of the votes.

Q. Have you attended all meetings of the Board of Directors of this Association from its inception?

A. I am sure I have since I became president with one exception when I was in the East.

Q. And you became president when? [199]

A. January, 1939.

(Testimony of F. P. Foisie.)

Q. Since January, 1939 has there ever been a meeting of the Board of Directors in which there was a division among the Board in which the question as to whether or not an associate member of the Board had a vote would have made any difference in the final result of action taken?

Mr. Gose: I renew my objection to that.

The Court: I will say again I don't think he has complied with any foundation. Just the fact that he was present there over a period of six years wouldn't prove anything.

Mr. Dobrin: Well, maybe I misunderstood your Honor.

Q. You presided at all meetings of the Board of Directors, did you? A. I did.

Q. And you put all the motions made to the Board? A. Yes, I did.

Q. And you called for all votes of the Board?

A. I did.

Q. Has there ever been since you became president of the Association——

The Court: Are you going to object?

Mr. Gose: He can ask if he presides at all meetings of the Board. I haven't heard what the next question is.

The Court: I am sorry. Finish the question.

Q. Has there ever been any occasion where you have put a motion to the Board of Directors where the fact that an associate member did or didn't have a vote would have [200] changed the result of a vote?

(Testimony of F. P. Foisie.)

Mr. Gose: Yes, I renew my objection to that.

The Court: Objection sustained. Counsel, I have sat in many meeting, sometimes as a presiding officer. Unless I made a careful analysis, I wouldn't be able to tell over a period of six years whether the elimination of one class of voters would or would not have affected the result. Now, you are showing he was present and presided at all but one meeting. It is a rare president who over six years can tell whether, if a few votes had been one way or the other, would have changed the results——

Mr. Dobrin: I think you are drawing on your own experience rather than the witness'.

The Court: I am not saying he can't but until he says he has analyzed these votes, I am not going to let him testify.

Mr. Dobrin: Maybe I haven't gone sufficiently far.

Q. Have you examined and considered all actions taken by the Board of Directors since you have been president of that Association for the purpose of determining the question as to whether or not if associate members of the Board had been entitled legally to cast votes, it would have made any difference in the result of any action taken by the Board? Now, that calls for a yes or no answer.

A. No.

Q. You have never made such an examination?

A. Not in the sense in which I understand your

(Testimony of F. P. Foisie.)

question. I can explain it, but I can't give a yes or no answer.

Q. Well, then will you explain it please?

A. We take decisions on acclamation. We don't poll the [201] directors. If there is a sharp cleavage on any issue, we invariably defer action because no voluntary association can proceed on a sharp division. So that if there is even a substantial body opposed, we quite invariably defer further action, further reconsideration before final action is taken. That is one phase of the answer. There are collateral issues——

Q. Well, has there ever been an occasion other than the one to which you have referred where the directors have not cast their vote by the acclamation that you referred to in meetings of the Board of Directors?

Mr. Gose: If the Court please, I object to that. The evidence already shows that associate directors have no legal power to vote.

The Court: Well, he may state whether they have voted by acclamation. That objection is overruled.

A. I have no recollection of a single vote being taken except by acclamation. I have only that one instance in mind, and it stands out sharply because it was a sharp division where ex officio members didn't vote one way or the other.

Q. But in every other instance they did vote one way or the other?

(Testimony of F. P. Foisie.)

A. That is to my reasonably clear recollection, yes.

Q. Since the beginning of your presidency of the Association? A. Yes.

Q. And I understood your testimony to be that if there were a division in the Board, any substantial division on any action, it is the practice of the Board to take no action?

A. Yes, that is well established.

Q. When you referred to that division did you include in that [202] a division in so far as it comprises likewise the associate directors?

A. Yes.

Q. Has there ever been a time other than the one occasion to which you referred where associate directors have in any way recorded any dissent from actions taken by the Board? A. Yes.

Q. In what other instances?

A. In the case of the ship clerks. We call them checkers in Seattle. There was a difference of opinion.

The Court: That was concerning ship clerks?

The Witness: Ship clerks or checkers, as we call them here. They are called variously. There was a division, and it was only a minority division and action proceeded, but there was a recorded dissent.

Q. What did that involve?

A. The matter of rate of pay to be higher here than the rest of the Coast, and all the other ports were opposed.

(Testimony of F. P. Foisie.)

Q. And the associate directors representing the local Waterfront Employers of Washington recorded their dissent, is that what you referred to?

A. Yes. I ought to recollect more because there has been a good many meetings. There are perhaps 24 meetings to keep in mind. Those are the two outstanding illustrations. They came in the one meeting.

Q. I think I asked you whether or not associate members put motions. Do they also second motions?

A. Yes.

Mr. Gose: Just a minute. I don't see the [203] materiality. It is clear from the by-laws of the organization that there is no voting power and no legal standing, and I think the practice under the circumstances is of little moment. The only importance of the point at all is that the steamship companies or voting members—they are the same thing—have the exclusive power of running the organization. The fact that they permit associate members at times to participate on some basis does not alter the fact that when any important issue comes up, the only important power rests in the voting members.

The Court: Well, this goes to my right to hear the witness testify. The Court has a right to hear, I think, what this witness says, and then the Court may agree with you or disagree with you afterwards as to what should be done with the testimony once given. Objection overruled.

Q. Do associate members participate in discus-

sions on all propositions placed before the Board of Directors? A. Oh, yes.

Q. When a vote is called for do they participate in the vote? A. Yes.

Q. If they should record a dissent to any action taken, is that dissent recorded?

A. It is Mr. Boyd's practice to record a dissent.

Q. You were asked by counsel whether or not the defendant in this case would be required to employ union labor in connection with the conduct of its business, and I wasn't quite clear as to your answer. I would like to ask you this question, as long as this defendant is a party to the [204] labor agreements of the Coast Association and the local association, is it your testimony that they would have to comply with the different provisions of those agreements?

A. Yes, obviously, obviously.

Q. If and when the defendant is no longer a party to such a labor agreement, are you expressing or did you express an opinion as to what it would then either factually or legally be obligated to do?

A. No.

Q. Is it your testimony that once it is relieved from its obligation under those labor contracts, it must thereafter employ Union labor in the conduct of its longshore-business? A. No.

Q. Is it your testimony that they would have to employ longshoremen from the particular union with which the present contract now exists once they are relieved from the obligation to the contract? A. No.

(Testimony of F. P. Foisie.)

Q. Under those circumstances would the defendant be at liberty to proceed as it is advised?

A. I am not a lawyer, but that is my knowledge, that they would be free under the National Labor Relations Act to do so.

Q. Mr. M. G. Ringenberg's name has been mentioned, and I think the testimony shows he is District Manager of the Coast Association stationed at Seattle.

A. Yes.

Q. Where is Mr. Ringenberg now?

A. Providence Hospital. [205]

The Court: What?

The Witness: Providence Hospital.

Q. Is he in such a condition that he is unable to attend this trial?

A. Yes.

Q. Reference has been made to the fees paid to representatives of the Coast Association on the Pacific Coast Maritime Industry Board, and I think your testimony was that fees were paid to such representative?

A. Yes.

Q. What becomes of those fees?

A. Those go into the Association. They don't personally benefit.

Q. Inquiry was made as to whether or not there are terminal operators who do stevedoring work, that is to say, the loading and discharging of cargo. Are there members of this Association who are terminal operators and who, in addition to their business as terminal operators, are also engaged in the stevedoring business of loading and discharging cargo?

A. Yes.

(Testimony of F. P. Foisie.)

Q. Is that true in all ports?

A. It is true in San Pedro and San Diego; it is true in San Francisco. I don't know of any instances in Portland or Seattle.

Q. So far as this Association is concerend, there is no objection legally or factually to a member changing its business from that of a terminal operator to that of a stevedore or to a ship owner or any one or more divisions of this same subject?

A. None whatsoever.

Q. Are there shipping companies who in addition to being engaged in the transportation of cargo by vessels are also engaged in the business of acting as stevedores in loading and discharging cargo?

A. Yes.

Q. And who are likewise engaged in the business of being terminal operators?

A. Oh, yes.

Q. Is there any objection from the standpoint of this Association to a stevedore, who loads and discharges cargo, assuming the function of being a terminal operator?

A. None whatever.

Q. Or being a ship operator?

A. None whatsoever.

Q. Do the members of this Association change from time to time and year to year?

A. Frequently.

Q. A terminal operator today may tomorrow be a stevedore?

A. That is correct.

(Testimony of F. P. Foisie.)

Q. A ship owner who today doesn't act as stevedore may tomorrow act as a stevedore?

A. Yes.

Q. And has that privilege gone on from the beginning of this Association?

A. Yes. I made a mistake in one of my earlier answers.

Q. All right. If you wish to correct it, you may.

A. I believe Chris Querin, a terminal operator, has recently formed a stevedore company.

Q. In what port? [207] A. Here.

Q. In Seattle? A. Yes.

Q. I show you Plaintiff's Exhibit 11, and I would like to have you glance through that so that you will have the subject matter in mind.

A. (Witness does so.)

Q. Referring to Plaintiff's Exhibit 11, you testified in response to a question on cross examination that the 4c per man hour assessment is levied against non-members of the plaintiff Association. I will ask you whether or not if such non-member of plaintiff Association is a member of one or more of the local associations, whether that tonnage assessment is levied,—whether that non-member assessment is levied and collected.

A. It is not.

The Court: If a non-member of the plaintiff association is a member of the local port association, the 4c assessment is not collected?

The Witness: Yes.

The Court: All right.

(Testimony of F. P. Foisie.)

Q. Is it correct then to put it this way, that the 4c non-member assessment is collected against only those who are non-members of either the Coast Association or the local association?

A. That is correct.

Q. And has that been true from the beginning of the non-member assessment?

A. It has been true, yes, since 1937.

The Court: We will take our recess at this time. [208]

(Recess.)

Q. Going back for one moment, Mr. Foisie, if a company whose primary function is that of a terminal operator acts as a stevedore and loads and discharges cargo, does it pay the tonnage assessment?

Mr. Gose: Do you know?

Mr. Dobrin: I asked him does it.

Q. When a company whose primary function is that of a shipping company acts as a stevedore and loads and discharges cargo, does it pay the tonnage assessment? A. It does.

Q. Irrespective of what the company's primary or secondary function is, when it loads and discharges cargo it pays the tonnage assessments?

A. It does.

Q. I call your attention to Exhibit 32, which is the minutes of the joint meeting of the Committee of Seattle and San Francisco representatives regarding assessments.

The Court: Seattle and San Francisco?

(Testimony of F. P. Foisie.)

Mr. Dobrin: Seattle and San Francisco committees, which title is a little inappropriate because it also includes the Portland committee.

Q. And I call your attention to Plaintiff's Exhibit 33, being minutes of meeting of the Board of Directors which followed the meeting described in Exhibit 32. At the meeting of the Board of Directors on May 27, 1943—and, by the way, I would like to have the original. Will you turn to the original of those documents in the minute book?

A. (Witness does so.) [209]

Q. At the meeting of the Board of Directors of May 27, 1943, recorded in Exhibit 33, was the proposal of the representatives of the San Francisco, Seattle and Portland groups, which appears in Exhibit 32, presented to the Board of Directors?

Mr. Gose: Aren't the minutes the best evidence of that, counsel?

Mr. Dobrin: It is preliminary.

The Court: Wasn't this all gone through on direct? It seems to me much of your redirect is repetition.

Mr. Dobrin: Maybe. I can get at it more directly.

Q. Will you please state whether or not Mr. M. J. Weber of the defendant company was present at the meeting of the Board of Directors of May 27, 1943, recorded in Exhibit 33—

Mr. Gose: Doesn't the exhibit itself show the persons present?

(Testimony of F. P. Foisie.)

Mr. Dobrin: It does. Do you agree he was there?

Mr. Gose: Yes.

Mr. Dobrin: All right.

Q. Did Mr. Weber during the course of that meeting at any time object to the submission of the Board of Directors of a proposal which was adopted as shown in Exhibit 32?

A. He did not.

The Court: My recollection is that this identical question was asked on direct.

Mr. Dobrin: I don't think I did.

Q. Mr. Foisie, you were asked about whether or not cargo was handled in a so-called split fashion in Seattle. What did you understand to be meant by that question? [210]

A. Where two different employers divide the work at ship's sling, one loading and discharging aboard ship and the other unloading or loading from ship's side, where the cargo is worked at ship's side.

Q. Is there anything peculiar about such operations in the Port of Seattle in that respect?

A. There is not.

Q. Does that same method of operation take place in every other port?

A. Yes, but not to the same extent.

Q. You mean in quantity? A. Yes.

Q. In connection with the actions of the Board of Directors of the plaintiff Association, what reports are made to its members of its actions?

(Testimony of F. P. Foisie.)

Mr. Gose: What has this got to do with redirect? I will object as improper redirect. I recall nothing about reports to the membership.

Mr. Dobrin: You introduced in evidence the resolution——

Mr. Gose: (Interposing) Not the reports to the membership.

Mr. Dobrin: I want to show what is done with these things.

The Court: Let me hear the question.

(Question read.)

The Court: Objection sustained.

Mr. Dobrin: I would like to ask the privilege of asking the question on direct examination——

Mr. Gose: I will not object. [211]

The Court: What?

Mr. Dobrin: If he wishes to object to it as not redirect, I would like to put him on in direct.

The Court: All right.

Direct Examination

A. The directors are given oral reports at all meetings; frequently also written reports at such meetings so that they may have them to read and study in front of them. The treasurer has a series of reports which he is better qualified to develop. The reports of committees are usually submitted in writing to the directors.

Q. Now, what reports to the membership are given of the actions of the Board of Directors?

A. The reports of the directors of actions of

(Testimony of F. P. Foisie.)

the directors to the members are primarily through Port Association meetings, or for the most part. Sometimes they are supplemented by written reports, given largely by the directors who return from the quarterly meetings. Then all actions taken by the directors on special subjects are sent by letter to all of the Coast membership. The secretary-treasurer sends most of those; I send some.

Q. And do you yourself attend meetings of the local associations and report actions of the Coast Association in various matters?

A. Yes, but, of course, only a part of the meetings.

Mr. Dobrin: I think that is all. I have one or two questions or redirect.

The Court: Are you now resuming on redirect?

Mr. Dobrin: Yes, your Honor.

Redirect Examination

Q. You have stated, Mr. Foisie, in cross examination that the California Stevedoring & Ballast Company acts as a contract stevedore for Army work in San Francisco? A. Yes.

Q. Are there any other stevedores or members of this Association who now have contracts for the loading and discharge of Army cargo in San Francisco?

A. Yes, effective April 1—I made a mistake on the previous answer—there were occasional other Army jobs done under a master contract, but they

(Testimony of F. P. Foisie.)

were so small I didn't include them along with the California Stevedoring & Ballast; but these two companies—and I didn't mention them because the question, as I understood it, was what other company is doing work.

Q. My question is what other companies have contracts with the Army for loading and discharging of cargo in San Francisco.

A. All stevedoring companies have such contracts and have had, but now two more are going to give the same type of operation that the California Stevedoring & Ballast has.

Q. What is the announced and expressed program of the Army for the handling of cargo in San Francisco for the future?

A. If and as work performed by California Stevedoring & Ballast and the next two companies concerned succeeds, all of the work will be turned over to contract stevedores.

Q. Now, prior to the war were Army vessels loaded and discharged by members of this Association?

A. Occasionally. Are you speaking of San Francisco?

Q. Yes. A. Yes.

Q. You do not have reference to those incidental movements in your answer? [213] A. No.

Q. And I think your testimony was that on all such cargo before the war the stevedore loading and/or discharging the cargo paid the tonnage assessment?

(Testimony of F. P. Foisie.)

A. There and everywhere else.

Q. Now, does the Army load and discharge cargo in other ports other than San Francisco through contract stevedores?

A. Everywhere else.

The Court: Except San Francisco? The Army hires stevedores?

Mr. Dobrin: To load and discharge cargo.

The Witness: Yes.

Q. And does it do so under contracts with the members of this Association as contracting stevedores? A. Yes, sir.

Q. And that is true in every port on the Pacific Coast?

A. It is. Excuse me. The Army doesn't load in every port, some small port, but where it is done, it is done by contracting stevedores.

Q. Do the contracting stevedores who load and discharge cargo for the Army in all ports with the exception of the defendant in this case for 1943 and 1944 pay the tonnage assessment?

A. There are two other exceptions in out ports here, one certainly and maybe two exceptions.

Q. And the one that you referred to is at Mukilteo? A. Yes.

Q. Does the United States Navy—

The Court: (Interposing) What is the Mukilteo exception? [214]

The Witness: It is an Everett stevedoring company that handles explosives at Mukilteo under

(Testimony of F. P. Foisie.)

contract with the Army. It is delinquent from our point of view.

Q. Does the United States Navy load and discharge cargo in all ports on the Pacific Coast?

A. There may be some small ports where it doesn't, but generally speaking it does in all ports.

Q. Does it do so under contract with contracting stevedores members of the plaintiff Association?

A. All of its work is so contracted.

Q. Is the tonnage assessment paid on all such cargo loaded and discharged by the stevedore loading and discharging the cargo?

A. Yes.

Q. Does that include the Port of Seattle?

A. It does.

Q. Do the contract stevedores up and down the Pacific Coast who load and discharge cargo for the United States Navy pay to the plaintiff Association the tonnage assessment?

A. Yes, without exception.

Q. And when you say "without exception" that includes all ports in the State of Washington including Seattle?

A. It does.

Q. Does the United States Navy, in addition to loading and discharging cargo through the Army and the Navy, also load and discharge cargo through the War Shipping Administration at all ports on the Pacific Coast?

A. Yes.

Q. Is such loading and discharging done through contract stevedore members of the plaintiff Association? [215]

A. That may need clarification; either contract stevedores or those who do contract stevedoring.

(Testimony of F. P. Foisie.)

That may be a steamship or terminal company, but doing contracting in the broader sense.

Q. And your answer in reference to this last question applies to the previous questions?

A. Yes.

Q. Do all members of the Association who load and discharge for the United States through the War Shipping Administration pay the tonnage assessment to the plaintiff Association?

A. All.

Q. Without exception?

A. Yes. I want to qualify that. I am not just sure about that Everett stevedore company. Mr. Boyd may give a better answer. I don't know, but if there is any exception, that is it.

Q. You were asked the question as to whether or not the Army has paid to the plaintiff Association the tonnage assessment on work which it does for itself in the Port of San Francisco, and your answer, as I understood it, was no.

A. If I understood the question correctly, yes.

Q. Now just explain to us how the Army came into the picture in San Francisco in loading and discharging cargo with its own employees.

A. Fort Mason has from time immemorial been a quartermaster station. There have been certain troop transport departures from Fort Mason to the Philippines for many years. The Army did the work of cargo loading in its own transport ships. As the war approached, naturally, they took [216] on more ships; with the nucleus of their organiza-

(Testimony of F. P. Foisie.)

tion, they extended their own work. As the work grew and grew and grew, they kept on doing it because they had built up a staff to carry on the work. Some of its work was let out by contracts, but it didn't increase in proportion to the increased work which the Army did. It is the one port in the country where they have continued to do it until latterly.

Q. What effect did this action of the Army have so far as the plaintiff Association was concerned—what facilities of the plaintiff Association, if any, do they use?

A. They used first and primarily the supply of men experienced in the accident prevention service, which was used to train their staffs and to give them the benefit of our experience. They abide by the contract though not parties to it because they cannot be parties to it. But they abide by it as though they were parties to the labor contracts, not one but several. They abide by an arbitrator's decision or a settlement of a dispute. In all ports they go along as though they were private employers under the contracts, but they are not bound. They pay separately. I should explain they pay the long-shoremen separately.

Q. In other words, they don't pay through the central pay office established in San Francisco?

A. They do happen to use the same facilities, but they write a separate check and distribute it with their own tellers.

Q. Do they participate in disputes under the

(Testimony of F. P. Foisie.)

labor contracts by way of the Labor Relations Committee and arbitrations and so forth?

A. They do on the sidelines. That is, they may appear in [217] case of a protest on pilferage or a matter in dispute, but always with the understanding that they reserve the right to be wholly independent.

Q. Have any discussions been had with the Army with reference to paying a fair amount for the use of such facilities of the plaintiff Association as they use?

A. Many over three years since their work became a substantial volume.

Q. How do they obtain men from the hiring hall in San Francisco?

A. Just the same way as any other employer would, by placing orders with the dispatchers, but checking in with the Navy and War Shipping Administration through the allocation committee, and when they decide between them as to the relative needs of the three services, they place their orders directly with the dispatcher as though they were a private employer.

Q. Now, you say there have been numerous discussions with the Army for the purpose of determining upon some compensation to the plaintiff Association for the use of its facilities.

A. Yes, even to the point of drawing contracts, several of them.

Q. What is the present status of those negotiations between the plaintiff Association and the

(Testimony of F. P. Foisie.)

Army with reference to the plaintiff receiving compensation?

A. The officials in Washington with whom I conferred on this within the month and the officials in San Francisco with whom I have been in contact since that time all give me reason to believe—though after three years I have come to some doubt—that they will be paying shortly to us. [218] There is one more technical hurdle to get over, and they expect that they will get over it.

Q. What is their position as to the compensation that they should pay to the plaintiff Association?

A. They claim that legally they cannot pay on any basis other than a lump sum, and they indicate through the years they want to do the fair thing, but declare they have difficulty legally in meeting some of their statutory regulations and have had trouble drawing the kind of a contract that will be sound. They therefore have agreed with us on a sum, and it is drafted on a lump sum monthly payment.

Q. What is the position of the Association as to what it will expect the Army to do with reference to the payment of compensation?

A. The Association has always felt that it was carrying the Army. The Army officials have declared that they regarded that they were being carried. They wanted to do the right thing but they have their own legal problems to overcome. They have raised the question as to what we would do

(Testimony of F. P. Foisie.)

in case they didn't pay. The directors authorized me to tell them that they would get men whether they paid a dime or any amount of money or nothing at all that we would do it for nothing, if necessary, as long as we had funds to carry on the operations, but we frankly expected them to hold up their end.

Q. And that is the position in which the matter presently rests?

A. That is correct, and that has been the case for three years. [219]

Q. Now, this refers only to work done by the Army with their own employees and not through contracting stevedores?

A. That is correct.

Q. Now, I wish you would refer to what has been admitted in evidence here as Defendant's Exhibit A, being the letter of February 2, 1943 from yourself to the Budget Committee.

The Court: Now, counsel, you have indicated that you are going to spend a great deal of time on this letter. If that is so, I would suggest that in the interest of time saving you let Mr. Foisie be recalled after lunch and let him look over the letter meanwhile.

Mr. Dobrin: We have done it very carefully, your Honor.

The Court: You have?

Mr. Dobrin: Yes.

The Court: All right.

(Testimony of F. P. Foisie.)

Mr. Dobrin: In anticipation that we might arrive where we are.

Q. Do you have the letter before you?

A. I have.

Q. Do the members of the Budget Committee necessarily come from the representatives of the voting members?

A. No, but generally they do.

Q. On the Budget Committee as it existed on February 2, 1943 were there non-voting members?

A. One.

Q. And that was who? A. Thomas James.

Q. And for what company?

A. The Associated Banning, one of two companies now doing [220] Army work.

Q. That is a stevedoring company?

A. Associated Banning Stevedore Company.

Q. In San Francisco?

A. And in Los Angeles.

Q. Do the members on the Budget Committee always come from San Francisco? A. No.

Q. Where else do they come from?

A. We had Mr. Lintner from Seattle from the American Mail Line.

Mr. Gose: I don't find him.

Mr. Dobrin: He is not here. Proceed. There is no objection.

Mr. Gose: I want to make an objection.

The Court: He is making a statement as to general practice.

(Testimony of F. P. Foisie.)

Mr. Gose: I thought it was addressed to this exhibit.

Mr. Dobrin: You misunderstood the question.

Q. Who else from Seattle have been on the Budget Committee if you recall?

A. Mr. Middleton when he was a representative of Dodwell Company.

Q. I call your attention to Paragraph 3 of this letter on page 1 and ask you whether the statement contained therein down to and including the semi-colon is correct or was correct on February 2, 1943?

A. In general that is the case, but it is not latterly correct.

Q. And did you explain in your direct examination what is [221] latterly correct?

A. I did.

Q. So that we will have it right at this same place, what is the fact latterly?

A. The fact is that there has been and are other companies, stevedore and terminal, who have paid the 21½c tonnage tax and are doing it now and have done it throughout for member companies where member steamship companies were also involved.

Q. Was that particular subject of any importance in the matter that you were engaged in presenting to the Budget Committee?

A. None whatsoever. There is no dispute; where there is a steamship member and a stevedore member, that is a matter of their contractual relations,

(Testimony of F. P. Foisie.)

with the normal result that the steamship companies pay direct.

Q. And that was understood by the Budget Committee?

A. It was. There is no issue of that sort.

Q. Referring to Paragraph 4 on page 1 of Exhibit A, reading, "In all ports on this Coast"—first, where did you get that information?

A. Let me read it.

Q. (Reading) "In all ports on this Coast but Washington, the stevedores allowed in their contracts for the Association assessment and are remitting regularly and in full." Where did you get that information and to what subject does that pertain?

A. In the general discussions of this subject the information which came to us, including from the Seattle representatives, was that everywhere else on the Coast the procedure [222] was invariably followed of seeing to it that in their working contracts as in their business contracts, provision was made and that in the State of Washington many of the companies did, but not all of them.

Q. Were you advised as to why some of them did not?

A. There was much discussion, but it centered on the fact, at least as the information which only comes to me through discussion, not in the sense of being parties to any of these contracts that for competitive purposes in some instances it was left out.

(Testimony of F. P. Foisie.)

Q. And when you say for competitive purposes, do you mean so as to reduce the bid?

A. That is right.

Q. Except as that information contained in Paragraph 4 of Exhibit A, page 1, was given to you by hearsay, that is all you know about it?

A. I am sorry to say I don't know of my own direct knowledge.

Q. Were you approaching the problems being dealt with by you at that time in this letter on that assumption?

A. Yes, sir.

Q. Referring to the last paragraph on page 1 of Exhibit A, (Reading) "In Washington ports this collection of assessments, it appears, has been carried out on all cargoes but Army." Let's stop there for a moment. Did you have in mind principally Griffiths and Sprague when you made that statement?

A. Yes.

Q. Now, have you since examined the fact as to whether or not even on February 2, 1943 Griffiths and Sprague had been paying on Army cargo?

A. I have discovered that they paid up to some time in 1942. I don't know the date.

Q. And in any event——

A. (Interposing) They did pay, and they ceased to pay, and that is what I had in mind.

Q. Is that first sentence in this letter then inaccurate?

A. It is. I merely took the information given to me in these discussions with Seattle members.

Q. Now, referring to the last sentence on page

(Testimony of F. P. Foisie.)

1 of Exhibit A which reads, "Some of the stevedores in Washington ports are delinquent on War Shipping Administration, lend-lease and commercial cargoes." Is there any such delinquency at the present time? A. None.

Q. Including the defendant in this case?

A. Correct.

Q. I call your attention to the second full paragraph on page 2 of Exhibit A, reading, "The Coast Board meeting with the stevedoring representatives declined to change the assessment policy, but concurred in the proposal to ask that companies who split the stevedoring contract by handling cargo to and from the ship in Washington ports (unlike the practice in other ports) share in the assessment." What meeting were you referring to in that paragraph?

A. I think it was the meeting of January 12. I am not sure.

Q. Now, am I correct, Mr. Foisie, that you are referring to the meeting of November 11 and November 12? Will you turn to the minutes of November 11, 1942 and November 12, 1942? [224]

A. Yes.

Q. Now, referring to the minutes of meeting of November 11, 1942, which is Exhibit 10 in this case; is that correct, your Honor, is that Exhibit 10? The minutes for November 11, 1942?

The Court: I don't have Exhibit 10.

Mr. Dobrin: Oh, 21, rather.

Q. Referring to the minutes of meeting of

(Testimony of F. P. Foisie.)

November 11, 1942, which is Exhibit 21 in this case, and the minutes of meeting of November 12, 1942, which is Exhibit 22 in this case, I will ask you whether or not those were the meetings to which you had reference in the second full paragraph of page 2 of Exhibit A to which I have called your attention.

A. Yes, the stevedore representatives, meaning primarily those from Seattle; also Portland.

Q. Have you examined those Exhibits 21 and 22? A. I have.

Q. Will you please state whether or not the second full paragraph of your letter of Exhibit A, page 2, is a correct statement of what occurred at those meetings?

A. No, it is somewhat in error.

Q. Well, specifically, did the Board of Directors at the meeting of November 12, either the meeting of November 11 or November 12 or 1942, shown in Exhibits 21 and 22, concur in any proposal to ask that companies who split the stevedore contract by handling cargo to and from the ship in Washington ports, share in the assessment?

Mr. Gose: I am going to object to this simply because it is an unnecessary consumption of time. We have [225] in evidence Plaintiff's Exhibits 21 and 22 and Defendant's Exhibit A. All the witness is doing is testify to some discrepancies between the two.

The Court: He may testify there is some discrepancy if he wishes.

(Testimony of F. P. Foisie.)

Mr. Dobrin: Yes. You have offered the statement. He has got to explain it.

The Court: Objection overruled.

Q. All that the Board did was to refer the proposal from Seattle back to the Seattle members and the committee for further study and further reports back. I think my language was not only in error but clumsy. The intent of the Board was to do anything possible to satisfy or appease local desire in this matter.

In this same paragraph in parenthesis are the words "unlike the practice in other ports." Do you see what I refer to? A. I do.

Q. Is that or is that not an erroneous statement?

A. As I said before it is erroneous to the point that there is the same practice in all ports, but it is more commonly the practice here than in other ports.

Q. Referring to Item numbered 1 on page 2 of Exhibit A, you have used the expression "stevedoring work on the dock." Is that a correct expression or description of the work?

A. Well, it is one of the loose terms. All stevedoring attaches to the ship.

Q. And to what function?

A. Loading and discharging. Handling is the customary term on the dock. [226]

Q. And so in Item 1 you referred to assessment of companies who do handling work on the dock?

A. Well, I don't know how to explain it.

(Testimony of F. P. Foisie.)

Q. You may explain it any way you wish.

A. Well, the question arose here in connection with the terminal operators who handle to ship's side and the stevedores engaged in terminal work. So the issue presented there was rather a division primarily between two stevedoring companies, one who loaded and discharged cargo into the vessel and one who unload and handled cargo to the ship's side.

Q. In other words, the second stevedore who did the handling on the dock was doing the terminal work?

A. That is right.

Q. Now, referring to the paragraph on page 2 of Exhibit A which begins with the words "The Washington trustees," to whom were you making reference?

A. The Board of Trustees of the Waterfront Employers of Washington.

The Court: "The Washington trustees" refers to?

The Witness: The Board of Trustees of the Waterfront Employers of Washington.

Q. I will read you the next sentence, "The Washington trustees advocated that companies doing Army and Navy work to ship's side should share the tonnage assessment, the Coast trustees agreeing if the Seattle member companies were willing." Is that or is that not an inaccurate statement?

A. It is inaccurate to this extent, that the position of the Board, as repeatedly stated in the min-

(Testimony of F. P. Foisie.)

utes, is that they [227] would not relieve member companies who loaded and discharged cargo from the responsibility for that assessment, but they were perfectly willing to have a local arrangement if it could be entered into amicably whereby the local people should in some respect satisfactory to the local people share that cost without relieving the member from the responsibility to the Coast Association.

Q. Well, referring specifically to the words "The Coast trustees agreeing if the Seattle member companies were willing."

A. The matter was referred back to the local committee for further study to find out what they could get done among the stevedores themselves and among the terminal operators and between the two of them.

Q. Well, is the reference there to what the Coast trustees were agreeing to your conception or your interpretation of what was done as shown on Exhibits 21 and 22?

A. Well, it is in error; it doesn't state the situation as it should have been stated.

Q. Well, that is the point I want to get at. In other words, up to that time the Coast directors had taken no such action as you described?

Mr. Gosc: Just a minute. I don't wish you to lead him in that fashion.

The Court: Well, counsel will have this in mind always, that when counsel are examining their own witness, if they wish the Court to be particularly

(Testimony of F. P. Foisie.)

impressed by the answer of the witness, that counsel will avoid as far as possible making the question leading. If counsel are not very much interested in the weight, if any, the Court [228] gives to a particular answer, counsel may lead as little or much as they feel inclined. That applies to both sides.

Q. Now, referring to page 3 of Exhibit A, with the words "The salient facts on which the Washington Association proposal is based are:" Do you see that? A. Yes.

Q. Now, is the next paragraph following that a statement by you of your position or the position as you understood it of the Washington Association?

A. Not only their position, but the facts throughout that statement are entirely theirs. They were gathered here. They were gleaned from their material submitted when I was here.

Q. I read the statement, "That it is equitable for those doing cargo handling on the dock to share the burden of the tax with those who do the cargo handling on the ship, thus putting this combined operation on a basis comparable with the custom in other ports on the Coast." That is the statement to which you have just made reference?

A. That is the statement underlying the proposal advanced by the local interests. It is not my statement but my summary of their position.

Q. Is the statement of their position to the effect, "Thus putting this combined operation on a

(Testimony of F. P. Foisie.)

basis comparable with the custom in other ports on the Coast," an accurate statement of fact?

A. No, as merely a pronounced condition here but existing elsewhere.

Q. Did you subscribe to the position as to the Washington [229] Association's view as to what is equitable? A. I could not.

Q. Well, did you? A. No.

Q. The information which follows the portion of this letter which I have just read, starting with the words "Concerning the work done on docks" and going to the end of page 3, where did you get that information?

A. From Mr. Middleton and Mr. Varnell, manager of the Northwest Terminal Association, as they worked out that part of a proposal from the Washington trustees which was under consideration. It was an effort to negotiate step by step what was proposed from Seattle.

Q. Do you know anything about the accuracy of the material thus supplied?

A. Only that I knew, for instance, that the manager of the Terminal Association and Mr. Middleton pretty much knew the situation.

Q. And this was material furnished to you?

A. That is right.

Q. And you were just repeating it?

A. I was trying to present the whole picture as I could gather it to the Budget Committee.

Q. Now, referring to the first paragraph on page 4 of Exhibit A, I will ask you whether or not that

(Testimony of F. P. Foisie.)

indicates anything with reference to the question as to whether or not this proposal for a different method of assessment was solely a local issue to be locally dealt with.

A. The proposal was local and was advanced to include contributions by steamship companies no longer operating as [230] steamship operators but as agents for the government.

Q. Was that proposal referred to in this Exhibit for Coastwise application or local application or in the Washington District?

A. It was proposed first for the Coast, as I recall it, and then there was an effort to see if it could be worked out locally. It was rejected at once from the Coast as a whole.

Q. Now, is the Alaska Steamship Company, referred to in the first paragraph on page 4 of Exhibit A, a company with headquarters locally in the State of Washington? A. It is.

Q. And is the reference to its contribution on a Coast basis or on a local basis?

A. Well, it presumably would be on a Coast basis if it were not for the fact that it was an entirely local operation.

The Court: It is noon. How long do you think it will be before your redirect of this witness is finished?

Mr. Dobrin: I haven't too much more. I have practically covered everything I will ask about Exhibit A.

(Testimony of F. P. Foisie.)

The Court: This Court is recessed and this case is recessed until 2:00 o'clock.

(Whereupon, at 12:00 M, a recess was had herein until 2:00 p.m.)

Q. Mr. Foisie, please refer to the last paragraph of Exhibit A, reading "Should the Washington trustees be unable to carry out their own proposals with their members, then [231] the uniform Coast assessment policy should be re-established for Washington ports as for all others." What did you have reference to, Mr. Foisie?

A. That the proposals advanced from the Northwest, which they had not been able to develop to the point where they could carry them out, were washed up and we would in all ports operate as we had in all other ports and proceed to the collection of the delinquencies.

Q. And by that you are referring to delinquencies in tonnage assessments? A. Yes.

Q. Now, what was the purpose of this meeting of the Budget Committee and the preparation of this letter, Exhibit A, which you presented to them?

A. It was an effort on my part to develop as nearly as I could instead of a long oral statement the entire picture—and there had been much that had gone before—with an effort of my own incorporated in that picture, to suggest every step that might be considered by the Budget and Finance Committee in the direction of the proposals of the Seattle group interested. It was, frankly, my

(Testimony of F. P. Foisie.)

appeasement program to try to reconcile differences between our membership.

Q. Now, referring to minutes of meeting of the Budget and Finance Committee of February 2, 1943, which is Exhibit B, I call your attention to that portion of the exhibit which says "Following is the concensus of opinion of the Executive Committee." Is that a correct statement, or should that be of the Budget and Finance Committee?

A. It should be the Budget and Finance Committee. The [232] Executive Committee at that time was separate, but the two have since been combined in one for the expediting of our war efforts.

The Court: It should be Budget and Finance Committee?

The Witness: Yes, sir.

Q. Now, after the semi-colon in the portion to which I have just called your attention, I call your attention to the first paragraph, "The tonnage assessment of 21½c per ton on all cargo handled by them other than commercial cargo handled by member steamship companies must be met by the contracting stevedores performing the work." To what work was reference being made?

A. Army, Navy and War Shipping, but particularly Army work because that was the only source of delinquency.

Q. And what type of work by the contracting stevedores?

A. The loading and discharging of cargoes.

(Testimony of F. P. Foisie.)

Q. Now, why is the statement made that this should apply to other than commercial cargo handled for member steamship companies?

A. Because we have never had any dispute on commercial cargoes. Always, usually, the steamship companies—one or the other have paid it.

Q. When you say one or the other you mean the steamship or——

A. The steamship or his contracting stevedore. There is no issue under those circumstances.

Q. And never has been?

A. Never has been.

Q. From the standpoint of the Budget and Finance Committee, how are the Army and Navy and War Shipping Administration [233] considered?

A. As non-member tonnage.

Q. Has that always been the position of the Association in its various committees and Board of Directors?

A. Always.

Q. Now, I call your attention to the next paragraph stating, "The Committe has no objection to the contracting stevedores getting relief from other stevedore companies performing part of the operation from the first or last place of rest on the dock to ship's side or vice versa." When they say stevedore companies there, to whom are they referring?

A. Well, my recollection of this is that the only persons who have ever been really involved have been stevedore companies who do some dock work between ship's side and place of rest.

Q. And is that directed to that operation?

(Testimony of F. P. Foisie.)

A. Yes.

Q. To a stevedore doing that operation?

A. Yes.

Q. How have we described that operation in this hearing?

A. Handling cargo.

Q. In the next paragraph it says this: "That this Association will not obligate itself to advise the terminal operators that they must contribute to the assessment." What terminal operators does that make reference to?

A. Those terminal operators who do only dock work and who do not include any loading or discharging of cargoes.

Q. And I call your attention to the next paragraph, "That this Association does not agree that the steamship companies [234] members of the Association must be forced to voluntarily contribute a portion of the 2½c tonnage assessment." To what does that refer?

A. It refers to the proposal which had been advanced from Seattle, that the steamship companies, even though they had ceased with the coming of the war to be steamship companies as operators and had become steamship agents for Army, Navy and War Shipping—that they should contribute, without freight revenues, to such fund and from whatever agency if they were paid by the Government a part of that straight 2½c tonnage assessment.

Q. What had happened to the steamship operators on this Coast on the advent of the war?

A. All of their ships were taken over. In one

(Testimony of F. P. Foisie.)

form or another they became agents, no operators, not steamship owners. That is true today.

Q. And agents for whom?

A. Uncle Sam in one or the other of the departments of the services.

Q. You mean the United States of America?

A. Excuse me. I am sorry.

Q. All right. The United States of America?

A. Yes.

Q. I call your attention to the next paragraph of Exhibit B where it is suggested that on the next visit to Seattle you endeavor to discuss the issue with Mr. Kenneth Coleman and D. K. McDonald. Did you come to Seattle after this meeting?

A. I did.

Q. Did you discuss this matter with Kenneth Coleman? [235]

A. I could not.

Q. Did you discuss it with D. K. McDonald?

A. Yes. I am not sure that I discussed it that visit. I am not wholly sure, but I think I did.

Q. But sometime subsequent to the date of this meeting?

A. Several times.

Q. I call your attention to the next to the last paragraph of Exhibit B and ask you to state why it was suggested that either Mr. Lawrence Bogle or A. R. Lintner advise the Seattle trustees of the Coast Board's policy?

A. So as to have as much of the spirit and attitude and discussion confined to Seattle members with the least intervention of anyone from San

(Testimony of F. P. Foisie.)

Francisco, not excluding myself, whose headquarters is San Francisco.

Q. What connection with the plaintiff Association did Mr. Lawrence Bogle have at the time of this suggestion contained in Exhibit B?

A. A director from Seattle.

Q. And what position did Mr. A. R. Lintner at that time hold——

A. With the Association? A director.

Q. ——with the plaintiff Association?

A. A director.

Mr. Dobrin: That is all. You may inquire.

Recross Examination

By Mr. Gose:

Q. Mr. Foisie, I understood you to testify that if the defendant would sever its connection with both the Coast and the Local Association, it could theoretically still engage in business with non-union longshoremens on the West [236] Coast of the United States. Did you so testify?

A. Yes. I don't know that I used the word "theoretically" but I think that is a fair question, and the answer would be yes.

Q. Practically, you know it would be impossible for it to do so, don't you?

A. My guess is it would be. I have no doubt that the defendant company would be obliged to deal with this Union by certification, which has not yet taken place because the certification has been for all the members of the Association.

(Testimony of F. P. Foisie.)

Q. You know of no instances, do you, in which any waterfront employer in any of the major ports on the Pacific Coast is able to operate with non-union labor, do you?

A. Any of our members?

Q. Anyone in the Port of Seattle, member or otherwise.

A. I don't know what waterfront employers there are outside of our own membership.

Q. I say you know of no instance in which anyone is so operating?

A. I don't know of any such instance, no.

Q. You know, of course, that, as all of us do, from October '36, I believe, down to the early part of February, 1937, when there was a dispute between the Waterfront Employers and the International Longshoremen's and Warehousemen's Union, that there was no ship that went in and out of the West Coast?

A. That is my clear recollection.

Q. Do you know whether Griffiths and Sprague, the defendant in this case, is the only contracting stevedore loading [237] for the Army in this Port of Seattle?

A. It has always been my understanding that they were the sole stevedore.

Q. Now, there is one other question I think we do not have a difference on, but I want to be clear on it; on some occasions in your testimony in answer to counsel's questions in connection with the Army I understood you to make reference to the

(Testimony of F. P. Foisie.)

use by the Army and Navy of its own employees in the Port of San Francisco. If that phrase was used, what was intended by it? The longshoremen employed by the Army through the hiring hall in San Francisco?

A. On the ship they have their own civilian service employees for dock work in conjunction with the ship.

Q. But in so far as longshoremen are used, those are in on sense civilian employees of the Army on any permanent basis?

A. They are not civilian employees at all; they are longshoremen out of the hall precisely as you asked.

Q. The steamship company members of the plaintiff Association whom you state are now out of business as steamship operators but still operate as agents, are, of course, being compensated by the United States Government for the services which they render as agents?

A. They are.

Mr. Gose: I think that is all.

Mr. Dobrin: That is all.

(Witness excused.) [238]

A. BOYD

being first duly sworn testified on behalf of Plaintiff as follows:

Direct Examination

By Mr. Dobrin:

Q. State your name, please. A. A. Boyd.

Q. Where do you reside?

A. San Francisco.

Q. What is your connection with the plaintiff Association? A. Secretary-treasurer.

Q. How long have you held such position?

A. Since the inception of the corporation in 1937.

Q. And what are your duties as secretary-treasurer?

A. Keep the records, moneys and keep the minutes of the Board of Directors and all committees and act under the orders of the president and the Board of Directors and do those things that a secretary-treasurer would ordinarily do in the regular course of business.

Q. I hand you Plaintiff's Exhibit 9 and call your attention to the memorandum agreement set forth therein, and I also hand you Plaintiff's Exhibit 10, being the memorandum agreement as signed by the defendant in this case and ask you whether or not an identical memorandum of agreement was on or about May 1940 signed by the majority of the contracting stevedores of the Association. A. That is correct.

Q. I call your attention to Exhibit H, being the

(Testimony of A. Boyd.)

resolution of the Board of Directors of the plaintiff on March 12, 1941 in which appears the following—

The Court: What exhibit? [239]

Mr. Dobrin: Exhibit 14. Thank you your Honor.

Q. —which contains among others the following statement: “* * * that the contracting stevedores be required to collect the tonnage assessment and pay the Association assessments for such cargo handled in conformity with the agreement authorized by the Board May 8, 1940.” To what agreement was reference there being made?

A. That refers to the agreement that we just identified that was signed by practically all the stevedores.

Q. And that is the one that is set forth?

A. Authorized on May 8, 1940.

Q. The one set forth in Exhibits 9 and 10?

A. Yes.

Q. And I call your attention to the further language: “* * * and signed by all of the contracting stevedore members of the several port associations on the Pacific Coast,” and I ask you whether or not that statement is correct and as to whether or not the memorandum agreement to which we have referred has been signed by all the member stevedore of the Association?

A. In checking up I find that there was one minor stevedoring company in San Francisco that did not sign the agreement. They were not in active

(Testimony of A. Boyd.)

business at the time. They have since resumed business and they have conformed in all respects.

Q. I call your attention to resolution of June 25, 1942, appearing in Plaintiff's Exhibit 17, and to this statement contained therein.

The Court: What date is that?

Mr. Dobrin: June 25, 1942. [240]

Q. (Reading) “* * * That the contracting stevedores or the steamship companies doing stevedoring of cargo for either the Army, Navy or W S A is obligated to report the tonnage so handled and pay the assessment to the Association in the same manner that non-member tonnage has been reported to the Association.” How was non-member tonnage reported to the Association?

A. It was reported on the authorized tonnage reporting blanks that have been in use ever since the beginning of the Association.

Q. I show you what has been introduced in evidence as Plaintiff's Exhibit 4 and ask you if that is the report form that non-member tonnage was reported on? A. Yes, that is it.

Q. And has Army, Navy and War Shipping Administration tonnage been reported on that same form? A. Yes, sir.

Q. Does the Association use any other form than that for the reporting of any kind of tonnage? That is the accredited form and the only one recognized for all ports? A. For all ports.

Q. And all types?

A. All types of cargo, yes, sir.

(Testimony of A. Boyd.)

(File of monthly reports of tonnage was marked Plaintiff's Exhibit No. 45 for identification.)

Q. I hand you what has been marked Plaintiff's Exhibit 45 for identification and ask you to tell us what it consists of.

A. These are certified tonnage reports, monthly tonnage reports from Griffiths and Sprague Company from December, [241] 1940 and end September 1942.

Mr. Dobrin: I offer in evidence Plaintiff's Exhibit 45.

Mr. Gose: I will enter an objection to its going into evidence. I think it has no purpose. The tonnage tax has been paid up to the end of 1942. Unless there is some proposal to show that the report is inaccurate——

Mr. Dobrin: That is not the purpose of it.

Mr. Gose: Otherwise, this controversy has narrowed down to the period from January 1, 1943 on. The volume of reports before that time casts no light on any issue in this case.

The Court: It may be they cast no light, in which event it seems to me there is no hurt. If they do cast light, they may be helpful; and the reports being Exhibit 45 are admitted. Objection overruled.

(Documents previously marked Plaintiff's Exhibit No. 45 for identification was received in evidence.)

(Testimony of A. Boyd.)

Q. Mr. Boyd, in connection with your duties are you the officer of the Coast Association who checks ships loading and discharging in the ports of the Pacific Coast to see that the tonnage assessment is paid on them?

A. It is done under my supervision, and I have done much myself.

Q. And in that way did you become acquainted with who are operating various vessels in and out of various ports on the Coast? A. Yes.

Q. Will you please look at the vessels named in the reports and tell us if any of those vessels are Army vessels, and, [242] if so, on which reports you are able to so identify them?

A. Well, there are some of them I am not sure about.

Q. Just tell us those you are sure of.

A. Well, take the Chirikoff and the St. Mihiel.

Q. Do you find Army vessels on the report for December 1940? A. Yes, sir.

Q. All right. Look at the next one.

A. And also on January 1941 and February 1941 and March 1941 and April 1941 and also on May of 1941 and June.

Q. June 1941?

A. June 1941. In July of 1941 the boats designated U. S. Army—there are a number of boats—there are about 10 of them that are shown as U. S. Army.

Q. Right on the report?

(Testimony of A. Boyd.)

A. Right on the report and so on down through to the end of these returns.

Q. Well, I wish you would go through them month by month.

A. All right. Then in August——

Q. What year?

A. 1941; it appears to be all Army; September likewise, all Army; October, 1941——

Q. What about October, 1941?

A. That is all Army; and November 1941 all Army; December 1941 all Army; January 1942 shows Army and February 1942 is Army.

The Court: All Army?

The Witness: Yes, sir. Well, there are some boats I am not really sure, but the majority of them are. They don't show on the reports that they are all Army. There may be one or two small vessels that I can't be [243] real sure about. They switch these new boats around, and we are not familiar with the names.

A. (Resuming) March 1942 shows majority as Army. And there is one report that just lists the months of April, May, June, July, August and September 1942 and shows the total amount of tonnage but doesn't show any details.

Q. In other words, the names of the vessels do not appear?

A. That is right.

Q. Do all those reports show tonnage loaded and discharged for the Army?

A. That is right.

Q. And the tonnage assessments on all of the

(Testimony of A. Boyd.)

tonnage handled by the defendant up to the end of 1942 has been paid? A. That is right.

Q. At the rate fixed in the resolutions of the Board of Directors at 2½c a ton?

A. Yes, sir.

Mr. Dobrin: Mark this as our next exhibit.

(2-page document entitled "Percentage Study of Port Expense Compared with Port Tonnage" marked Plaintiff's Exhibit No. 46 for identification.)

Mr. Dobrin: Hand that up to His Honor, please.

The Court: That has not been admitted yet?

Mr. Dobrin: No, but I was going to ask some questions about it, and I thought it would be helpful if your Honor had it.

Q. Mr. Boyd, I show you what has been marked Plaintiff's Exhibit 46 for identification, consisting of two pages marked respectively pages 1 and 2, and I wish you would look at page 1 and tell us what that exhibit purports to [244] show.

A. It is a percentage study of port expense compared with port tonnage for the calendar year 1942.

Q. What does column 1 show?

A. That shows the districts, the names of the districts.

The Court: To 1943 or through?

The Witness: No, the calendar year for 1943.

Q. Column 1 shows districts?

(Testimony of A. Boyd.)

A. Column 1 shows districts on the Pacific Coast.

Q. Take for instance, where it says Seattle, does that refer to the Port of Seattle or what?

A. That covers the Puget Sound area and all Washington ports exclusive of Washington Columbia River ports.

Q. What does the Portland district cover?

A. Portland and the Oregon Bar shores and Washington ports on the Columbia River.

Q. In other words, the State of Oregon including the Columbia River ports?

A. That is right.

Q. And the designation San Francisco includes what?

A. California north of San Pedro.

Q. And Southern California includes what?

A. Southern California includes ports south of San Pedro.

Q. What does Column 2 indicate?

A. That is the amount of money expended by the Coast Association in the several different districts during the calendar year 1943 for expenditures in which the Coast Association made payment to the several districts.

Q. Is that direct expenditures in the districts?

A. It is spent in the district and reimbursed by the Coast. [245]

Q. I mean the expenditures are made in the——

A. In the several districts, yes, sir.

Q. And what items does that cover?

(Testimony of A. Boyd.)

A. That covers the general administrative costs in each district, hiring hall expense and safety expense. Those are the three broad divisions.

Q. What does Column 3 show?

A. Column 3 shows the percentage that each one of the amounts in Column 2 bears to 100%.

Q. What does Column 4 show?

A. Column 4 is the tonnage reported in the several districts during the calendar year 1943.

Q. What tonnage?

A. Tonnage handled by the member companies and paid for to the Coast Association.

Q. Handled in what way?

A. Loaded and discharged from ships.

Q. What does Column 5 show?

A. That shows the percentage the tonnage in Column 4 bears to 100%.

Q. In Column 2 I note an asterisk which contains a note at the bottom of the exhibit. What is shown by that asterisk and the note?

A. It notes that there is excluded from the figures in Column 2 the head office expense, which includes safety, administrative, legal and arbitration, which are not included in the figures set forth in Column 2.

Q. In other words, the amount shown in the footnote and the amount shown in Column 2 aggregate the total expenditures of the Coast Association? [246]

A. That is correct.

Q. And the amount shown in the single asterisk

(Testimony of A. Boyd.)

is the amount which is incurred at the head office of the Association? A. That is correct.

Q. Does that amount incurred at the head office of the Association include services performed for all the districts?

A. Oh, yes. To get the true expenses of the districts, it should be prorated.

Q. Now, in Column 4 I notice a double asterisk in the line for Seattle and a note at the bottom. What does the double asterisk note indicate?

A. It indicates by adding 1,389,161 tons shown there to the tonnage shown in Column 4 would give a different percentage in Column 5.

Q. Now, does page 2 of Exhibit 46 disclose the same information that you have described for the year 1944? A. That is right.

Q. That is the calendar year 1944?

A. The calendar year 1944.

Mr. Dobrin: I offer Exhibit 46 in evidence.

Mr. Gose: If the Court please, I would like to record an objection against this exhibit, my reason being that it purports to show a variety of expenditures in the various ports of the Pacific Coast as compared with the volume of shipping operations in those ports. I don't know of any conceivable theory upon which the right to levy dues is asserted, even by the plaintiff, based upon proportionate distribution between the different ports. As I understand, the plaintiff asserts in this case that [247] they have a right to levy $2\frac{1}{2}\%$ tonnage tax on every ton of cargo handled by a member moving through

(Testimony of A. Boyd.)

West Coast ports, and I can't conceive any connection between that contention and this exhibit, which purports to show some proportionate distribution in the volume of operation between different ports. I just don't see how it can bear on any issue.

The Court: Objection overruled. Exhibit 46 admitted.

(Document previously marked Plaintiff's Exhibit No. 46 for identification was received in evidence.)

Q. How many shipping members are there of the plaintiff Association at the present time?

A. At the present time there are 84.

Q. How many associate members are there of the plaintiff Association at the present time?

A. At the present time 47.

Q. How do those figures compare relatively with the membership of the Association from the beginning?

A. They are a little below, maybe 10%, shipping members. The associate members is up a few. There was a drop off of shipping members right after December 1, 1941.

Q. And that was accounted for in what way?

A. By the Jap and the German lines that were immediately excluded from the roster.

Q. Otherwise those figures represent substantially the membership of the Association?

A. That is right. There have been one or two deletions and one or two additions.

Q. Are all companies or persons performing

(Testimony of A. Boyd.)

stevedore service [248] loading and discharging vessels on the Pacific Coast, members of either plaintiff Association or one or more of the local associations? A. They are.

Q. Do you have a membership book?

A. We have, yes.

Q. Do you have it with you?

A. It is here, yes, sir.

Q. Will you please turn to the place in the membership book where the name of the defendant appears?

A. The page is unnumbered where the signatures are.

Q. But you have turned to it?

A. I have turned to it.

Q. And it is there? A. Yes.

Q. And is that the original signature of the defendant?

A. Yes, sir, to the original by-laws.

Q. Attached to the original by-laws?

A. Attached to the original by-laws.

Q. Now on that same page is there a signature by a company known as the Northern Stevedore, Inc.?

A. Yes, sir, that is five signatures up from the bottom of the same page.

Q. And who signed the original signature to the by-laws of the plaintiff Association for that company?

A. The Northern Stevedores Company by F. E. Settersten.

(Testimony of A. Boyd.)

Q. Is that the same Mr. Settersten now president of the defendant company? A. It is.

Q. I call your attention to Plaintiff's Exhibit 10, the last [249] sheet, which is a photostatic copy of the original signatures of Griffiths and Sprague Stevedoring Company to the memorandum agreement and ask you if there is any other signature on that agreement.

A. Yes, right under Griffiths and Sprague Stevedoring Company by J. Weber is Northern Stevedores, Incorporated by F. E. Settersten.

Q. Is that the same Northern Stevedores, Inc. to which you referred as being in the membership book? A. Identical.

Q. And it is the same Mr. Settersten?

A. The same one.

Q. Do all persons or companies loading or discharging cargoes on the Pacific Coast pay tonnage assessments and have they from the beginning of the Association? A. They have.

Q. And in particular have those persons loading and discharging cargoes who performed no other function except being stevedores—have they from the beginning paid the tonnage assessment to the Association? A. They have yes.

Q. As secretary of the plaintiff association, do you make reports to the membership?

A. Yes.

Q. Tell us just generally of what those consist.

A. Well, there is a report to the membership at the annual meeting. They are always given an an-

(Testimony of A. Boyd.)

nual financial statement, and throughout the year on the authorization of the Board or the president, they are given other reports as occasion demands, that are sent out to the full membership. [250]

Q. And are reports sent out by you as secretary informative reports, also to the local associations? A. That is correct.

Q. And has that been the practice from the inception of the Association?

A. Since the beginning, yes.

Q. And continues down to and including the present? A. It does today, yes.

Q. How is the budget of the plaintiff Association arrived at?

A. The budgets for the port associations by the port managers, who prepare——

Q. May I stop you a moment? That covers expenditures.

A. Expenditures anticipated in that district like the Puget Sound District and the Columbia River District for Portland and San Francisco and Southern California.

Q. Expenditures by whom?

A. Expenditures for the Coast Association which have to be reimbursed.

Q. All right. Proceed.

A. These district budgets approved by the port managers are submitted to the boards of trustees or the directors of the several districts who pass on them, pare them down or raise them up, and

(Testimony of A. Boyd.)

they are finally approved and then they are sent to the Coast treasurer in San Francisco.

Q. That is you?

A. That is me. And there the port budgets are consolidated along with the general head office budget and this consolidated budget is submitted to the Budget and Finance Committee just prior to or several days prior to the annual meeting. They review the budget; it usually takes [251] two days, and they pare it down or raise it or make adjustments that they see fit. They make an official report to the Board of Directors at the annual meeting, and the Board of Directors——

Mr. Gose: (Interposing) If the Court please, I object to this line of testimony. I don't think we are at all interested in the details of the budget or how it is arrived at. The question is whether this defendant is liable for a tonnage tax, and the method of working out the budget or the details does not help any.

The Court: At the present moment I cannot see very much help to the Court. However, if I only let in that information that I know exactly what it is for in the beginning, I may not let in much. I will overrule the objection. I will let counsel know that I am not yet highly impressed with its importance.

Mr. Dobrin: Yes, I understand your Honor.

Q. On what budget is the Association now operating and has since the commencement of the war?

A. We are operating on the last budget that was submitted in 1941. The uncertainties of condi-

(Testimony of A. Boyd.)

tions caused us not to set up an annual budget, but the ports work on the last budget that was approved, and any increases have to be submitted to the Budget and Finance Committee for authorization before they can be incurred in the several districts.

Q. Now, what financial reports are given by the plaintiff Association to its members or local associations or directors or anyone else?

A. There is a financial statement submitted to the annual meeting and submitted to the members. It is in writing. [252] Monthly, there is a monthly financial statement given to directors and ex officio directors and port managers of each district and the port president.

Q. Each month?

A. Each month and annually too.

Q. And do those financial reports show moneys received and from what source and all expenditures made and for what by the plaintiff Association?

A. They do in summary form. They are not in minute detail, but they show the source and expenditures.

Q. Are the records of the plaintiff Association open at all times to all members?

A. That is a rule of the Board, and it has always been followed.

Q. And that includes both voting and associate members?

A. Everybody that is a member.

(Testimony of A. Boyd.)

Mr. Dobrin: That is all. You may inquire.

Cross Examination

By Mr. Gose:

Q. Do you send out occasionally mimeographed information sheets to the membership?

A. Oh, lots of it, yes.

Q. Do you send those to the associate members as well as the others?

A. The procedure is that we send it to all the Coast members of record, and then there is a supply sent to each of the district with instructions for the port managers there to see that all of their local members get a copy.

Q. Do you as secretary generally mail any such notice directly [253] to the various associate members such as the defendant in this case?

A. Not always; we do frequently, and I will explain why. Many of the shipping members are members in one or the other of the ports. Their agents are also members of the Coast Association and the district associations in other ports. And to be sure that everybody is fully informed, the Coast membership mailing list is sent out from San Francisco and an adequate supply sent to each of the ports so that every one of the members of a local association is fully advised of what everybody gets.

Q. Your illustration referred, as I understood you, to steamship company members and their agents. The defendant in this case falls in neither of those categories.

(Testimony of A. Boyd.)

A. No, I picked out that example because I wanted to explain why there was a dissemination in the mail. Sometimes it might happen with an associate member too. But it is usually a steamship member who will have a membership in one of the ports and who will also have an agent in the three other ports who are members of the local association in that port. And it is just as important to keep them informed as the head office of the member company.

Q. Yes, but that would be no particular reason for not sending it directly to the associate member, would it?

A. We have asked that the local managers be sure that the associate members do get it and that they are not overlooked from San Francisco, which might happen.

Q. Did you send a resolution concerning this tonnage tax——

Mr. Dobrin: (Interposing) Just a minute. In your admissions—— [254]

Mr. Gose: The by-laws provide it.

Mr. Dobrin: That is objected to as immaterial. In your admissions you admitted that you received it.

The Court: Overruled.

Q. The by-laws specifically provide for you to send a postal notice. Have you ever done so?

A. I am not sure about every; it has been done in some cases.

Q. Have you been familiar during your occu-

(Testimony of A. Boyd.)

pancy of the office of secretary-treasurer with the following article 16 of the by-laws: "Notice of any action taken by the Board of Directors with respect to dues or assessments shall be sent to the members promptly by registered mail, and shall not become effective until seven days after such mailing." Have you been familiar with that clause?

A. Yes, I am familiar with that.

Mr. Dobrin: And I want to object again. It is not within the issues. There is no defense asserted in this case that there is anything defective about the resolutions fixing the tonnage assessment by reason of the failure to send them by registered mail; and it is expressly admitted and already offered in evidence that the defendant received each and everyone of them. It is not within the issues.

Mr. Gose: I may say that is to be a subject for argument later. As far as not being within the issues is concerned, the plaintiff alleges duly levied assessments, and here is a provision of the by-laws providing for sending by registered mail of a notice, and I think I am entitled to show it has not been followed.

The Court: Objection overruled. [255]

Mr. Dobrin: Exception.

Q. I will show you Plaintiff's Exhibits 15, 16, 17, and 18, 15 being a copy of the resolution of the Board of Directors of the plaintiff adopted on April 16, 1942; 16 being a letter from yourself as secretary-treasurer dated April 27, 1942; 17 being a resolution adopted by the Board of Directors on

(Testimony of A. Boyd.)

June 25, 1942; and 18 another form letter from yourself referring to the resolution which is Plaintiff's Exhibit 17. Now, having all those exhibits in mind, having both of the corporate resolutions in mind, was any notice concerning either of those resolutions ever sent to any of the membership by registered mail? A. No, sir.

Q. And referring to the two form letters which are respectively Plaintiff's Exhibits 16 and 18, were either of those sent to the membership by registered mail? A. No, sir.

Q. I think after the institution of this suit you did send out a notice on or about November 16, 1944 that you did send by registered mail, is that correct? A. I don't recall.

Mr. Gose: Will you mark this Defendant's Exhibit C.

(3-page document marked November 16, 1944, was marked Defendant's Exhibit C for identification.)

Q. I will show you Defendant's Exhibit C for identification and ask you if you recognize it.

A. Yes, I do.

Q. And I will ask you if there appears a statement in the [256] upper lefthand corner "Registered mail"? A. Yes.

Mr. Dobrin: Just a minute. Let me see it.

Mr. Gose: Oh pardon me.

Mr. Dobrin: Objected to as improper cross examination.

The Court: Objection sustained.

(Testimony of A. Boyd.)

Mr. Gose: I think that is all, although I wish to call him as my own witness in due course.

Mr. Dobrin: Plaintiff rests.

(Recess.)

Mr. Gose: May it please the Court I indicated I think last Friday that our proof would be very brief and that I would not address a motion to the Court at this time. I am abiding by that statement. I think it unnecessary perhaps to make any extended opening statement because your Honor has a statement of the issues in the briefs that have been filed. But I did make a brief reference at the outset of the case, and it is essentially my purpose to complete it as I see it by supplying some things we deem material that I assume counsel does not. And I may say this, I will not be able to complete my case because of time limitations this afternoon, although I will make an effort at it, and counsel and I were discussing during the recess the proposition of having the record written up and providing your Honor with a copy, each side to bear half of the expense.

The Court: Now counsel, I want to say one thing. I had planned that we would quit this afternoon at our usual hour of 4:30. If counsel thinks that they [257] can get all the evidence in by 5:00 o'clock or 5:30 or 6:00, we will all stay on the job. It is a very desirable thing to have the evidence all in at one time. On the other hand, if it means that we will run over until tomorrow morning, I

am still very fearful of what litigants and witnesses and attorneys can think up overnight.

Mr. Gose: My thought is that we have been so inaccurate in our predictions, we would be safer to stop at 4:30.

(Discussion off the record.)

A. BOYD

having been previously sworn, was recalled and testified on behalf of the Defendant as follows:

Direct Examination

By Mr. Gose:

Q. Again returning to Defendant's Exhibit C that you and I were discussing a few moments ago, is that a form letter which was sent to the membership of the plaintiff Association?

A. That is right.

Q. To what members would that have been sent?

A. That was sent to all members.

Q. By that what do you mean? Sent directly to the associate members as well as voting members?

A. All members.

Q. Do you recall that of your own knowledge?

A. Yes.

Q. Do you recall whether it was sent by registered mail?

A. Yes.

Mr. Dobrin: Objected to as immaterial. [258]

The Court: Overruled.

(Testimony of A. Boyd.)

Q. Do you recall whether it was sent by registered mail as indicated? A. It was, sir.

Q. That, of course, was sent by you as part of your functions as secretary-treasurer?

A. That is correct.

Mr. Gose: I wish to offer this in evidence not only for the purpose of showing the mailing in this instance by registered mail, and also Paragraph 2 describes the background on an issue of fact that has been controverted here. If the Court cares to read it at this time.

The Court: Exhibit C is offered?

Mr. Gose: It is offered.

The Court: It is admitted.

Mr. Dobrin: Just a minute. I haven't seen it.

The Court: All right. He may see it.

Mr. Gose: Pardon me.

The Court: I waited, and I thought you were avoiding saying there was no objection and that you were not making any.

Mr. Dobrin: Objected to as immaterial to any issue in this case.

The Court: Let me see it please. My attention is particularly directed to the second paragraph?

Mr. Gose: Yes, that portion dealing, if your Honor please, with the historical practice of steamship companies having reported tonnage and paid the assessments——

The Court: Objection overruled. [259]

(Document previously marked Defendant's

(Testimony of A. Boyd.)

Exhibit C for identification was received in evidence.)

Mr. Dobrin: Exception.

The Court: Allowed.

Mr. Gose: I believe, Madam Clerk, you have a Plaintiff's Exhibit 3-A not admitted.

The Clerk: Yes.

Mr. Gose: Counsel, to avoid the necessity of interrogating Mr. Boyd, is it agreed that this is a true copy of the complete resolution of July 31, 1937, which it purports to be?

Mr. Dobrin: It is agreed that that is.

The Court: What is that?

Mr. Gose: 3-A. I may say this for the Court's information. This is a true copy of the resolution adopted by the Board of Directors of the plaintiff on July 31, 1937, consisting of six numbered paragraphs. I will hand it to your Honor. The plaintiff has already put in evidence in this case the paragraph numbered 2 as Exhibit 3, just Paragraph No. 2. However, the entire resolution, and it is the first resolution promulgated by the Board of Directors of the plaintiff on this subject—the entire resolution consists of six paragraphs. Paragraph 1 refers to collective reporting and central pay offices. Paragraphs 3 and 6 refer to various other subjects in connection with the financing of the organization. I should like to have before the Court a complete resolution.

The Court: Do you offer it?

Mr. Gose: Yes. [260]

(Testimony of A. Boyd.)

(Discussion off the record.)

The Court: Any objection?

Mr. Dobrin: No.

The Court: Admitted.

(Document previously marked Plaintiff's Exhibit 3-A for identification was received in evidence.)

Q. Can you pick out your minutes in your minute book for February 15, 1940?

A. Any date that is in there.

Q. Will you step down and get it please?

The Court: February 15 of what year?

Mr. Gose: 1940.

(Document dated February 15, 1940 was marked Defendant's Exhibit D for identification.)

Q. Do you have the minutes of the directors' meeting of February 15, 1940?

A. This is it. (Indicating in minute book.)

Q. Let me examine it a moment. (Does so.) I show you, Mr. Boyd, Defendant's Exhibit D for identification and I will ask you if that is a true copy of the recommendation of the stevedoring committee made on February 15, 1940 and filed as part of the original minutes of the plaintiff corporation? A. That is correct, sir.

Q. And before offering that I will ask you, do you have similar minutes there which show a meeting of the Board of Directors on the same date?

A. That is correct.

(Testimony of A. Boyd.)

MR. GOSE: Will you mark this Defendant's Exhibit E. [261]

(Document dated February 15, 1940 was marked Defendant's Exhibit E for identification.)

Q. Showing you Defendant's Exhibit E for identification, may I ask you if that is a true copy of the resolution adopted by the Board of Directors of the plaintiff at a meeting held on February 15, 1940 which, according to the language of the resolution, adopts the report of the Stevedoring Committee? A. It is, sir.

MR. GOSE: I am going to offer these. Would you care to examine them?

MR. DOBRIN: Yes, I know what they are. I object to the offer on the ground that, as I think counsel knows, and as the record already knows, this resolution was rescinded on May 8, 1940, as appears by Exhibit 9, I think it is, which is already in evidence.

THE COURT: I will look at 9 and D and E. E was offered?

MR. GOSE: Yes. I haven't made a statement in support of them. I just showed them to counsel. If you have any doubt about it, I would like to be heard in support of the offer.

MR. DOBRIN: I call your Honor's attention to that first paragraph of the memorandum of agreement.

THE COURT: Where does it say this previous one was rescinded?

(Testimony of A. Boyd.)

Mr. Dobrin: In the first paragraph of the memorandum agreement.

The Court: Oh, yes.

(Argument.) [262]

The Court: Objection overruled. Exhibits D and E admitted.

(Documents previously marked Defendant's Exhibits D and E for identification were received in evidence.)

Mr. Dobrin: Exception.

The Court: Allowed.

(Excerpt from minutes of Joint Meeting of Board of Directors dated January 12, 1943 was marked Defendant's Exhibit F for identification.)

Q. I will ask you, Mr. Boyd, to step down and get your minute book showing the meeting for January 12, 1943.

A. (Witness does so.)

Q. Is this the minute of January 12, 1943 of a joint meeting of the Board of Directors of the Waterfront Employers Association of the Pacific Coast and the Waterfront Employers Association of San Francisco?

A. That is correct.

The Court: What year?

Mr. Gose: January 12, 1943.

Q. I will show you Defendant's Exhibit F for identification and I will ask you to examine it and tell me if that is a true excerpt from those minutes for that meeting.

(Testimony of A. Boyd.)

A. Yes, that is; correct, they are.

Mr. Gose: I will offer Exhibit F in evidence for two purposes, one to show the history of this controversy as dealt with by the Board of Directors of the plaintiff Association, in a general way showing what their program was, what transpired as they went along; and, secondarily, to bring out the fact that again here the plaintiff has [263] endeavored to use indirect methods to collect this tax in this particular case. The resolution will show that Mr. Foisie was instructed to get in touch with the Army and endeavor to influence it——

Mr. Dobrin: It doesn't say so.

Mr. Gose: We will let the Court see it.

Mr. Dobrin: I think it would be better.

The Court: Are you offering it?

Mr. Gose: I am offering it.

Mr. Dobrin: I object to that on the ground that it is immaterial to any issue in this case.

Mr. Gose: After your Honor has read it I would like to discuss it more specifically.

The Court: Objection overruled.

(Document previously marked Defendant's Exhibit F for identification was received in evidence.)

(Letter dated March 12, 1943 was marked Defendant's Exhibit G for identification.)

(Letter dated March 12, 1943 was marked Defendant's Exhibit H for identification.)

(Testimony of A. Boyd.)

(Letter dated March 25, 1943 was marked Defendant's Exhibit I for identification.)

(Letter dated April 19, 1943 was marked Defendant's Exhibit J for identification.)

(Letter dated May 14, 1943 was marked Defendant's Exhibit K for identification.)

Mr. Gose: I will now offer in evidence Defendant's Exhibit G for identification, a letter of one page, a copy of a letter of one page dated March 12, 1943, addressed to Special San Francisco Committee. [264]

The Court: What date is that letter?

Mr. Gose: March 12, 1943 addressed to Special San Francisco Committee: J. A. Lunny, W. P. Sexton, W. J. Bush, Thomas James, and written by Special Committee representing Employers of Washington appointed by Mr. Middleton, signed by R. C. Clapp, S. Stocking, William Semar, F. E. Settersten. I offer that.

The Court: Is there any objection?

Mr. Dobrin: Yes, I object to that on the ground that it is immaterial to any issue here. The mere existence of a letter itself does not prove anything; and if it is offered as proof of anything that it contains, I object to it as hearsay. In other words, the way to prove a fact is to bring a witness in here so that he can be permitted to be cross examined. That letter contains alleged statements of fact by the signatories to the letter. We don't have any opportunity to cross examine them on it.

(Testimony of A. Boyd.)

I don't believe that is the way for him to prove facts. If the offer is merely to prove that such a letter was written, that would be one thing, and that would clearly be absolutely immaterial to any issue here, that someone had written a letter, that one committee wrote a letter to another committee. This plaintiff Association can't be bound by letters that people write around to each other.

Mr. Gose: Counsel, I don't think you have developed the facts fully. Might I have Plaintiff's Exhibit 24? This series of letters, if your Honor please, are connecting links as I see it.

(Argument.) [265]

The Court: The Court is advised there are some more letters or exhibits which have some connection, at least claimed by the defendant, with this proffered Exhibit G. Ruling reserved as to G.

Mr. Gose: I now offer—and I think we might shorten the time because I think the same objection will run to all——

Mr. Dobrin: (Interposing) Yes, but I have to state my objection as you offer them.

Mr. Gose: I appreciate that. I now offer Defendant's Exhibit H, another letter.

Mr. Dobrin: Can't you give the date so that we can identify them?

Mr. Gose: Another letter of March 12, 1943 from the Seattle Committee to the San Francisco Committee; a letter of March 25, 1943 from the same San Francisco Committee——

Mr. Dobrin: What is that?

(Testimony of A. Boyd.)

Mr. Gose: Exhibit I.

The Court: Exhibit I, a letter.

Mr. Gose: —from the same San Francisco Committee, purporting to be in response to letters of March 12, which are G and H respectively; and I offer Exhibit J, which is a response from the Seattle Committee under date of April 19, 1943 to the San Francisco Committee, the same committees heretofore referred to; and I offer finally Exhibit K, which is a letter of the San Francisco Committee to the Seattle Committee dated May 14, 1943, specifically answering the Exhibit J, the letter of April 19, 1943 and telling the Seattle Committee to come to San Francisco [266] on May 26 for the meeting to be held by the Coast Board. They all tie up and lead into that meeting of May 26 and 27.

Mr. Dobrin: I think I can make my objection quite plain. I object on the ground that the letters are incompetent and immaterial and irrelevant to any issue in this case. They contain hearsay statements of fact by persons other than the plaintiff in this case or its officers, and what it all amounts to is this, counsel says he wants to show what took place at the meeting on May 26, 1943. Well, here is the situation quite simply. The record already shows that a San Francisco Committee came up here for the purpose of seeing if they couldn't get Griffiths and Sprague to pay their tonnage assessments. They came up here and they were successful. Griffiths and Sprague promised orally and in writ-

(Testimony of A. Boyd.)

ing to pay it. So the committee went home. They had accomplished their mission. But while they were here the local Washington Association, as the record already shows, appointed a committee to further discuss with the San Francisco Committee so-called possible changes in the method of tonnage assessments used, and then followed these letters back and forth between the parties containing all kinds of statements, arguments and everything else that people could think of to discuss this subject. Then followed a meeting, as the evidence shows, in San Francisco on May 26, 1943. That is already in evidence—at which the Seattle Committee, the San Francisco Committee and a group from Portland who had not theretofore been involved in this, met, including Mr. Weber of the defendant [267] company. At that meeting, irrespective of anything that had taken place, irrespective of what contentions one way or the other by these two committees in this exchanged correspondence, at that meeting those three groups prepared a written proposal for submission to the Board of Directors of the plaintiff. That written proposal is the one of May 26, 1943. So whatever went before this exchange of correspondence or even before that, going back as far as you want to find any arguments or discussions about this subject, they all culminated in the written proposals of May 26, 1943 by the three combined groups that met in San Francisco. That is in evidence. That proposal was presented to the Board of Directors on May 27, 1943 and it was

(Testimony of A. Boyd.)

approved. Now, anything that precedes that on this subject is absolutely immaterial because whatever they discussed or whatever statements of fact were made, those were all discarded and the wishes and desires of the Seattle Committee, with Mr. Weber on it, were reduced to writing and presented to the Board on May 27, 1943—considered by the Board of Directors and approved. Why should that be permitted to be put in this record?

(Argument.)

The Court: I am rather doubtful that I can make a correct ruling on the objections and offers at the present moment. I haven't correlated in my mind the numerous exhibits which have already been introduced, and I think I will reserve ruling as to all this last offer.

Mr. Gose: That is very satisfactory and I may say, your Honor, if the Court thinks they are immaterial, [268] they need not be considered in its decision if they are improper.

The Court: I am to understand, counsel, that there is no objection on the ground of authenticity of these exhibits?

Mr. Dobrin: Oh, no, we are not questioning that, your Honor.

The Court: There has been no identification of them by any witness. They have been only presented.

Mr. Dobrin: That is correct. We agree that if they went through all the labor of proving their authenticity, we would eventually get to that end.

(Testimony of A. Boyd.)

Q. Now, will you obtain for me your books for April and June 1942?

A. (Witness does so.)

Q. I believe you have, Mr. Boyd, 17 members on the Board of Directors of the plaintiff corporation?

A. That is right.

Q. And I believe you have certain regular quarterly meetings of the plaintiff corporation, do you not?

A. That is right.

Q. What months do those quarterly meetings fall in?

A. February, May, August and November; the second Wednesday, I believe, in each of those months.

Q. So that any meeting held in April or June would not be a regular meeting?

The Court: What months are the regular meetings held in?

The Witness: February, May, August and November.

Q. Any meeting held in April or June would not then be a [269] regular meeting?

A. It would be a special meeting; that is right.

Q. Addressing your attention to your meeting of April 16, 1942, does your minute book show any notice having been given to the directors of that meeting?

The Court: April what?

Mr. Gose: April 16, 1942.

Mr. Dobrin: I object to the question as being

(Testimony of A. Boyd.)

without any issues in the case, if I understand it. That April 16, 1942 resolution was——

Mr. Gose: It is one of the two resolutions you rely on.

Mr. Dobrin: That is Exhibit 15, and your admission—Plaintiff's Exhibit 15 in this case, as the record shows, was Exhibit I to Plaintiff's Bill of Particulars. That is the request for admission and the admission which has already been introduced in evidence in respect to this resolution.

The Court: What is the admission?

Mr. Dobrin: "That Exhibit I to the Plaintiff's Bill of Particulars on file herein sets forth a true copy of the resolution duly adopted by the Board of Directors of the plaintiff on April 16, 1942." Now, that means, if it means anything, that it is in all respects regular, and they have admitted it, and that is no longer in issue, and cannot be raised.

The Court: Why should I not sustain the objection?

Mr. Gose: It was not my purpose—to me, it is procedural propriety, but I think it is minor, and if you think I have gone beyond—— [270]

The Court: (Interposing) I will sustain the objection.

Q. Will you tell me, Mr. Boyd, if you know, did the membership as distinct from the,—has the membership of the plaintiff corporation as distinct from its Board of Directors ever taken any action

(Testimony of A. Boyd.)

in respect to the fixing of this tonnage tax? Has there ever been a vote of the membership?

Mr. Dobrin: Just a minute. On that issue I again want to interpose the same objection. Every resolution that has been introduced here on tonnage assessment was preceded by a request for admission that the resolution was duly adopted, and in every case they have admitted it. Now, that is not within the issues as pleaded. There is no such objection raised in this case in any of the affirmative defenses, and, specifically, in each instance they have admitted that the resolutions were duly adopted. Now, it seems to me there ought to be some time when the defendant would run out of the right to raise questions. He has not raised it in his answer, and he has admitted in the request for admission that they were duly adopted. Having been admitted that they were duly adopted, I say it is improper to permit him to go behind it. That is what we came to trial on, the admissions we have in evidence.

Mr. Gose: I by no means concede this point. If your Honor please, duly adopted, as I understand it, refers to specific procedural requirements as to the meeting having been convened or this being the action of the directors. But the point I am now urging and the [271] question I am now presenting is based on that provision of the by-laws of Article 4 which empowers the Board of Director to levy, assess and collect dues and so on, but it says in the latter portion, "But the Board of Directors shall not have power to levy, assess or col-

(Testimony of A. Boyd.)

lect dues or assessments in excess of a maximum rate to be fixed, at a regular or special meeting, by the vote of members holding a majority of the voting power of the entire membership.”

The Court: Let me see that. Is it your position that the members holding a majority of the voting power of the entire membership fixed a maximum which has been exceeded by this resolution?

Mr. Gose: It is my position that it is a condition precedent to the exercise of the power by the Board that the membership first fix a maximum and that the Board has the power to operate within it. The article says, “The Board * * * shall not have power to levy, assess or collect,” and it is my position that the assessment does not come into being until the membership has placed a ceiling on——

The Court: (Interposing) Is there anything in your pleadings that would raise this issue?

Mr. Gose: Nothing except the general denial of appropriate resolutions.

The Court: This is not a ruling yet, counsel, but it does seem to me that there is much weight in the contention of Mr. Dobrin that your admission forecloses this attempt of yours.

Mr. Gose: In that connection, your Honor, I would [272] like, with your Honor’s permission, to withdraw the admission to the extent of stating that it was never the intention or purpose of the defendant to construe “duly adopted” as to bar us from that defense. That was a request as to

(Testimony of A. Boyd.)

whether that was a true copy of the resolution duly adopted. That was a request as to whether that was a true copy of the resolution duly adopted. I can see counsel's point, and perhaps there is some merit as to the procedural aspect, but I certainly didn't intend to admit the constitutional power of the Board to adopt any such resolution, and I certainly would like to withdraw any admission of the word "duly".

The Court: It comes a little late after plaintiff rests. In many respects plaintiff has predicated its case on your admission. For you to come in now and say that you want to change——

Mr. Gose: (Interposing) There isn't the slightest element of surprise in the case. Either you have done it or your haven't.

Mr. Dobrin: It certainly is a surprise to me.

The Court: Just a minute, counsel. I think what is at issue at the present moment is of greater concern than the issue of this lawsuit. Litigants, of course, can have difficulty in agreeing with the Court in such an announcement because to a litigant the all-important thing is that the particular controversy be fairly and correctly determined. Those who are acquainted however with trials, lawyers and judges, know that no judge can ever be sure and no jury can ever be sure, regardless of how much or how little testimony is admitted, that the [273] decision is either correct or is fair. The only thing a judge can ever hope or a jury can ever hope is that a reasonable majority of the

(Testimony of A. Boyd.)

decisions are reasonably correct and reasonably fair.

So that whatever is done in the matter of procedure must be viewed from the standpoint of precedent for what may happen in the future. Until not so long ago there was no such procedure as has been used in this case. But at the desire of many thoughtful persons the rules of civil procedure were proposed, and after much consideration were adopted as a necessary step in progressive court practice. If I permit the withdrawal in this case, I am going to make it very difficult to ever insist that admissions are other than temporary. The defendant is represented by able counsel. The preliminaries to this trial have been exceedingly meticulously managed; and I have the opinion that even at the risk of this case being decided wrongly, that a greater ill would result from permitting the requested withdrawal than the benefit that would come from permitting it even though the defendant rests on this issue.

I am not persuaded that the point is as important to the case as counsel may think, and I am not persuaded at the present moment that the plaintiff would be hurt as much as Mr. Dobrin fears or that the defendant would be helped as much. But I am absolutely satisfied that to permit it here means that as far as this court is concerned this rule of civil procedure has become a dead letter until I would suffer the chagrin of telling counsel in the next case that I had one rule in this lawsuit

(Testimony of A. Boyd.)

and [274] another rule in a subsequent case. I am not willing at the present moment to invite that chagrin, not because of any personal pride in the ruling, but because I would have the chagrin of feeling that I was being unfair with one party and attempting to be fair with some other. So the requested withdrawal is denied.

Mr. Gose: With respect to your Honor's ruling, I don't concede, and I think the record should show that the scope of the admission is, as a matter of fact, not what plaintiff maintains.

The Court: You will be permitted to contend, of course, that your admission is of less consequence than counsel thinks, but your admission, whatever it is, stands in this case.

Mr. Gose: There is an objection also, if your Honor please, I think in the record to the question that I put predicated, your Honor, on the fact that I made the admission. Has your Honor ruled on that?

(Question and answer read.)

Mr. Dobrin: I move to strike the answer, and I object to the question on the ground that it is without the issue of this case. The contention now raised was raised for the first time that I saw it any place or knew that there was any suggestion of it, was after I got the trial memorandum and read it and saw some suggestion in there that there might be among other defects not specified the one now contended for. In the first place, if it were contended that that provision of the by-laws re-

(Testimony of A. Boyd.)

quires first a setting of a maximum before the Board of Directors could levy any assessment, that is an affirmative defense and should have been set up. There is no affirmative [275] defense in this case raising that issue; and in addition, as to each resolution pertaining to tonnage assessment, the request for admission was to whether or not it was duly adopted; and in every instance it was admitted that it was. Now, when we come to the trial there wasn't any such issue in this case. When I rested my case there was no such issue; and I don't think counsel should be permitted to raise it now. It is the same position your Honor has already referred to in connection with the requestions for admission.

Mr. Gose: The allegation, of course, was that pursuant to the by-laws this resolution had been duly adopted.

The Court: Is it your purpose to show that there was not a vote?

Mr. Gose: To the best of my knowledge and my research, there was no affirmative vote, no action taken by the Board.

The Court: Mr. Reporter, will you read the question and answer?

(Question and answer read.)

The Court: This witness said there was.

Mr. Dobrin: There is a motion, of course, before the Court to strike that. I am objecting because I don't think the issue of whether there was a vote or was not a vote has anything to do with the issues

(Testimony of A. Boyd.)

in this case for the reason I already stated. I don't think I could add anything to my reasons.

Mr. Gose: My position on the contrary is that there must be a resolution not only adopted in a procedurally [276] proper manner but it must be in conformity with the by-laws, and "when I admitted as a matter of fact that there was a resolution duly adopted, I meant procedurally the Board of Directors had adopted that resolution. That is the construction I put on it and always have, and I think I am still entitled to inquire whether or not that resolution so procedurally adopted was in the exercise of any valid power——

Mr. Dobrin: (Interposing) I think that is an odd argument. If I were asked to admit a resolution levying an assessment was duly adopted and I had in mind that I was going to contest the fact that the Board did not have any power, I certainly wouldn't admit it.

The Court: Well, we have a rather peculiar situation. The defendant wishes to show by this witness that there was no vote. The witness has given a statement that there was, and the party who wishes to strike the affirmative statement is opposed to the party who is contending there was none. I will reserve ruling on this, and I am going to allow this witness to be examined on this question under reservation of ruling, which means all this examination is an offer of proof. I am a little intrigued by this situation in any event. So it is understood this is in the nature of an offer of proof, and it

(Testimony of A. Boyd.)

is all over the objection of the plaintiff. It is understood it is not in evidence unless and until such time as I have given counsel an opportunity to argue against the offer of proof. It is an offer of proof under oath. You may proceed.

Mr. Gose: I don't entertain any thought it would [277] do any good to try to finish tonight. We might perhaps try to get Mr. Boyd out of the way so that he will not have to come back.

The Court: And the reservation of ruling will apply to the question and his answer, to which you moved to strike.

Q. Did the membership take some action with respect to the tonnage tax at some time as shown by your minutes? A. They did.

Q. On what occasions? A. Back in 1937.

Q. Will you show me in the minute book where it is indicated?

A. It is not in the minute book. They certified to the resolution and accepted the resolution sent out to them by mail.

Q. Might I see that particular part of the minute book you are referring to?

Mr. Dobrin: For fear that when this issue is subsequently argued that your Honor might think I had another thought then that I don't have now, I want to say this, that in my judgment all we are talking about is absolutely immaterial because even though it were shown and could be shown that that by-law required that the membership first fix a ceiling before the Board could do anything, it

(Testimony of A. Boyd.)

is in evidence that not only this defendant but all of the members of the Association have from the beginning, all of them have been paying their tonnage assessment and no one has ever raised the issue. I just mention it so that when I argue that point, if we get to it, that it won't appear as an afterthought on that matter. [278]

Q. Is what you are pointing out to me a part of the reconvened special meeting of the Board of Directors of the Waterfront Employers Association of the Pacific Coast held on July 31, 1937?

A. That is right.

Q. That is not a meeting of the members of the Association, the 84 and the 47, or their equivalent?

A. No, that is correct. This resolution was ratified by all the members. It was sent out to them and certified by all the members, each having ratified that resolution.

Q. Each having ratified it, you say?

A. Yes.

Q. How did they do it?

A. They got a certified copy of this resolution with their consent on it, which was signed by some official of the company.

Q. And you mean they sent it back in that fashion? A. That is correct.

Q. Do you have any of those copies with you that they sent back?

A. I think I have. May I look in my book (referring to documents). They were sent out, a

(Testimony of A. Boyd.)

certified copy of their resolution, and this is their consent, their ratification.

Mr. Dobrin: A little louder.

The Witness: This is a certified copy of the directors' resolution of July 31, 1937, and attached to each one of these certified copies of the resolution is the signed,—it reads like this, "We hereby ratify and approve the resolution adopted July 31, 1937 by the Board [279] of Directors of the Water-front Employers Association of the Pacific Coast fixing the rate of assessment and budgetary matters enumerated therein as per certified copy of said resolution attached to this certification."

Q. All right. I have just a couple of questions in connection with that. No comparable thing was done by the membership at a regular or special meeting of the membership?

A. That is correct, sir.

Q. And furthermore nothing similar to that was ever done except for the resolution of July 31, 1937, was there?

A. I believe that is correct.

The Court: Let me see the resolution of July 31, 1937. Is that one of the exhibits?

Mr. Gose: That is Exhibit 3-A in its entirety. You may inquire.

The Court: Well, it is at least 4:30.

(Discussion off the record.)

The Court: The trial of this cause is continued until Friday Morning, May 18, at 10:00 o'clock a.m. or as soon thereafter as the matter may be heard.

(Testimony of A. Boyd.)

At this time the Court wishes the minute to show that the Court is urging counsel to endeavor to finish the case in one day, and the minute may further show that the Court will listen to an application by counsel in event they don't finish in the one day that the case be continued on Saturday the 19th. I am being a little careful not to contract with you because I am not trying to invite you to make Mr. Long's prediction come true.

(Discussion off the record.)

(Trial adjourned to 10:00 a.m., May 18, 1945.)

May 17, 1945, 2:00 p. m.

The Court: Gentlemen, you have this afternoon and all day tomorrow. I hope under those circumstances that you finish this trial before regular closing time tomorrow afternoon. You may proceed.

Mr. Gose: I think we had Mr. Boyd on the stand. Will you resume the stand, Mr. Boyd, please?

A. BOYD

having been previously sworn, was recalled and testified on behalf of the Defendant as follows:

Direct Examination

By Mr. Gose:

Q. Mr. Boyd, the defendant Griffiths and Sprague Stevedoring Company is an associate member of the plaintiff corporation, is it not?

(Testimony of A. Boyd.)

A. That is right.

Q. And has been at all times since the origin of the plaintiff association in 1937?

A. That is correct, sir.

Q. It is not now and never has been a voting member, has it? A. No, sir.

Q. Now, as to some other members, your records indicate that Ames Terminal is an associate member of the plaintiff corporation?

A. That is right.

Q. Where does it do business by the way?

A. I believe they are in Seattle. [281]

Q. Western Stevedore Company,—is that an associate member? A. Yes, sir.

Q. And it does business in Seattle too, does it not?

A. In the Puget Sound area and Seattle.

Q. Salmon Terminals,—is that an associate member? A. Yes, it is.

Q. Also doing business in Seattle?

A. I think so, yes.

Q. Schafer Terminals,—is that an associate member doing business in Tacoma?

A. Let's see. Schafer Terminals,—I don't have them on this associate membership list, so I guess they never did,—don't belong.

Q. Puget Sound Freight Lines?

A. No, they are not.

Q. Of Tacoma? A. No.

Q. Baker Dock Company of Tacoma?

A. No, sir.

(Testimony of A. Boyd.)

Q. None of those Tacoma organizations are members of the Coast Association?

A. That is correct.

Q. How about the Rothschild Company?

A. You mean Rothschild-International?

Q. Yes.

A. Yes, they are associate members.

Q. Where do they do business?

A. Puget Sound generally, I believe.

Q. Those people that you mentioned who are associate members, [282] aren't any of them voting members?

A. An associate member is not a voting member.

Q. And cannot be both?

A. According to the by-laws.

Mr. Gose: I will ask that this be marked for identification, please. I think my last exhibit was K. Counsel, I furnished you a copy of this. Is it agreed that that is a true copy?

Mr. Dobrin: Yes.

(Document purporting to be resolution of November 10, 1943 by Board of Directors of Waterfront Employers' Association of the Pacific Coast was marked Defendant's Exhibit L for identification.)

Q. Mr. Boyd, I am showing you Defendant's Exhibit L for identification, which purports to be a true copy of the resolution adopted by the Board of Directors of the Waterfront Employers' Association of the Pacific Coast on November 10, 1943. Can you tell me whether that is a true copy of a

(Testimony of A. Boyd.)

resolution adopted by the Board of Directors of the plaintiff corporation on that date?

A. That is, sir.

The Court: What date?

Mr. Gose: November 10, 1943. I am offering this in evidence.

Mr. Dobrin: Objected to as immaterial.

The Court: Let me see it.

Mr. Dobrin: And after your Honor has read it, I would like to comment on the objection further.

(Court examines Defendant's Exhibit L for identification.) [283]

Mr. Dobrin: The ground of immateriality is that it has nothing to do with any issue in this case of which I am advised. This is a recommendation that the Board have a study made of the situation as to delinquent members, and I can't conceive of its importance in this case at all.

The Court: Objection overruled. Exhibit L admitted.

(Document previously marked Defendant's Exhibit L for identification was received in evidence.)

Mr. Gose: You may inquire.

Cross Examination

By Mr. Dobrin:

Q. Mr. Boyd, I call your attention to Defendant's Exhibit C, which is in evidence, being a letter signed by you as secretary-treasurer dated November 16, 1944.

(Testimony of A. Boyd.)

The Court: That is what exhibit?

Mr. Dobrin: Exhibit C. Do you have an extra copy of that exhibit?

Mr. Gose: No, I don't. That is the only one I have. I don't have one of my own.

The Court: Is that a letter?

Mr. Dobrin: Yes. I would like to approach the witness if you have a copy of the exhibit.

The Court: Do you have a copy for the witness?

Mr. Dobrin: Yes.

Q. I call your attention, Mr. Boyd, to the second paragraph of the first page of this exhibit and particularly to the [284] second sentence, reading as follows, "Formerly, with minor exceptions, all tonnage was reported to the Association and assessments paid by member steamship companies, contracting stevedores paying on no cargo other than such non-member tonnage handled by them." Is that an accurate statement?

A. No, it is not.

Q. In what respect is it inaccurate?

A. In that it is stated there that contracting stevedores pay on no cargo other than such non-member tonnage handled by them. That was a general practice, but it didn't cover all the cases; there were exceptions.

Q. And by "exceptions" what do you refer to?

A. There are a number of instances where contracting stevedores did pay for member steamship companies,—paid their tonnage.

Q. Paid the tonnage assessment?

(Testimony of A. Boyd.)

A. Paid the tonnage assessment, yes.

Q. In cases where they handle cargo, load and discharge it, for member companies?

A. That is correct.

Q. And do they still do that?

A. That is right. It is the exception, not the rule.

Q. But the exception still exists?

A. It does very pronouncedly.

Q. Was that particular point of any materiality in connection with this letter that you wrote?

Mr. Gose: Oh, I object to that. The letter speaks for itself, if your Honor please, what its purpose was. I don't think he should be permitted to say what is [285] material and what is not.

The Court: What the witness says will not bind me, of course, but he may say it. Objection overruled.

Mr. Dobrin: Read the question please.

(Question read.)

A. No, sir.

Q. I show you Defendant's Exhibit D, being a recommendation of the stevedoring Committee dated February 15, 1940, and I ask you whether that recommendation was ever put into force and effect?

A. No, sir, it never was.

Q. I show you Defendant's Exhibit E for identification, and I will state for the record that that exhibit—

The Court: E for identification?

(Testimony of A. Boyd.)

Mr. Dobrin: Yes, and I will state for the record that Exhibit E refers to Exhibit D, being the Board's resolution adopting the recommendation which appears in Exhibit D.

Q. Mr. Boyd, was that resolution as shown on Exhibit E ever put into force and effect?

A. No, sir, it never was.

Q. Was the resolution shown in Exhibit E adopting the recommendation of the Stevedoring Committee shown on Exhibit D ever rescinded by the Board of the plaintiff? A. Yes.

Mr. Gose: I object to that on the ground that the best evidence, I think, on that subject would be a subsequent resolution. If it was rescinded, it should show by resolution.

The Court: I think so. [286]

Q. I show you Exhibit 9, Mr. Boyd, and ask you to point out in that document anything pertaining to the resolution shown on Exhibit E.

A. Down under Memorandum of Agreement dated May 9, 1940.

Q. And what part do you say is applicable?

A. Which is as follows, "Pursuant to resolution of the Board of Directors of the Waterfront Employers' Association of the Pacific Coast passed May 8, 1940, which rescinds the resolution of February 15, 1940 on this subject.

Q. Now what resolution of February 15, 1940 was being referred to in this document Exhibit 9?

A. That is Exhibit, that was just——

Q. (Interposing) The previous exhibit.

(Testimony of A. Boyd.)

A. Exhibit E, I believe.

Q. I ask you again, to what resolution of February 15, 1940 was reference made in Exhibit 9?

A. That refers to the recommendation of the Stevedoring Committee which was adopted by the Board dated February 15, 1940, marked Exhibit D.

Q. And the Board's resolution appears on Exhibit E?

A. Exhibit E, yes, sir.

Q. And thereafter did the plaintiff association at any time consider the recommendation of the Stevedoring Committee shown in Exhibit D and the resolution shown in Exhibit E of further force or effect?

A. You mean after the February resolution?

Q. Yes.

A. No, sir.

Mr. Dobrin: The cross examination is completed, your Honor. [287]

Redirect Examination

By Mr. Gose:

Q. Mr. Boyd, you stated that,—to be more precise, you pointed out in Plaintiff's Exhibit 9 the language "Pursuant to resolution of the Board of Directors of the Waterfront Employers' Association of the Pacific Coast passed on May 8, 1940". Can you tell us what resolution of May 8, 1940 that refers to?

A. Well, that refers to this resolution that adopted this report.

Q. It refers to the resolution immediately preceding on Plaintiff's Exhibit 9?

(Testimony of A. Boyd.)

A. That is right, adopting the memorandum agreement, yes, sir.

Q. It doesn't refer to Plaintiff's Exhibit 8 then, I take it, which is also a resolution of May 8, 1940?

A. Well, no, it doesn't refer to this. This appointed a committee to draft the memorandum of agreement. This was prior, and this is the resolution that adopts the report which rescinded the February agreement, which was never put into effect.

Q. So that we are entirely clear, the resolution of May 8 or 9, 1940 that is referred to, is the first paragraph of Plaintiff's Exhibit 9?

A. Adopting that whole report, yes.

Mr. Gose: Nothing further.

Mr. Dobrin: That is all. You may step down, Mr. Boyd.

(Witness excused.) [288]

K. J. MIDDLETON

being first duly sworn, on oath testified in behalf of the Defendant as follows:

Direct Examination

By Mr. Gose:

Q. State your name please.

A. K. J. Middleton.

Q. What is your occupation?

A. I am Vice-President of the Waterfront Employers' Association of the Pacific Coast and presi-

(Testimony of K. J. Middleton.)

dent of the Waterfront Employers' Association of Washington.

Q. You live here in Seattle?

A. Yes, sir.

Q. And have for a considerable period of time?

A. Yes.

Q. For how long, if you will please?

A. Since 1916.

Q. Since 1916. How long have you occupied each of these two positions that you were mentioning, vice-president of the Coast Association?

A. Approximately January 1, 1942.

Q. Since January 1, 1942 you have been vice-president of the Coast Association? A. Yes.

Q. How long have you been president of the Waterfront Employers of Washington?

A. Approximately the same time.

Q. Since January 1942? A. Yes.

Q. Prior to that time what business were you engaged in?

A. With the firm of Dodwell & Company. [289]

Q. You were what?

A. Director of Dodwell & Company, a lumber and shipping firm. I was located in Seattle.

Q. You were located in Seattle?

A. The firm has branches in many places all over the world.

Mr. Gose: Mark this please.

(Document purporting to be resolution adopted by Board of Trustees of Waterfront Employers Association of Washington Novem-

(Testimony of K. J. Middleton.)

ber 24, 1942 was marked Defendant's Exhibit M for identification.)

Q. I will show you this document marked Defendant's Exhibit M for identification and I will ask you if that is a true copy of a resolution adopted on November 24, 1942 by the Board of Trustees of the Waterfront Employers Association of Washington.

The Court: What date?

Mr. Gose: November 24, 1942.

Mr. Dobrin: Is that the document you gave me?

Mr. Gose: That is a copy.

Mr. Dobrin: It is not correct; I can tell you that.

Q. Do you have the minute book for that particular day here?

A. I don't think so, no. That is the Washington?

Q. The Washington Association.

A. No.

Q. You didn't bring that with you?

A. No, I can get it.

The Court: Is there an answer by the witness?

The Witness: I was about to say when I was interrupted, to the best of my knowledge it is, but counsel [290] stated it is incorrect.

Q. I don't know what is wrong with it. I have taken it from the correspondence. May I have the letter?

Mr. Dobrin: I may be wrong but I thought I—

(Testimony of K. J. Middleton.)

Mr. Gose: (Interposing) Counsel has agreed that this will constitute a part of it, and that is as much as I need so far as I am very vitally interested in at all.

The Court: Is it agreed now it is a part of such resolution?

Mr. Gose: Yes, that is what I understood.

Mr. Dobrin: That is correct. It is a part.

Mr. Gose: I will offer it in evidence. I think, it has been amply identified for that purpose.

Mr. Dobrin: Just a minute.

The Court: Exhibit M is offered. Any objection?

Mr. Dobrin: Just a minute. If the Court please, I object to the resolution, first, on this ground, that this purports to be a resolution and is a part of the resolution adopted by the Waterfront Employers of Washington, the trustees, on November 24, 1942. No resolution which the Board of Trustees that corporation could pass could be binding in any way upon this plaintiff association; and for that reason any action which was taken on this date or any prior or subsequent date by that Association by its trustees would be immaterial to any issue in this case. And, second, if the resolution which was adopted on that date is of materiality, then the entire resolution should be offered and not just a selected portion of it. But I rely principally, your Honor, upon the [291] fact that it is immaterial to any issue here. It is no more important than if counsel brought in a statement that I wrote out

(Testimony of K. J. Middleton.)

in my office or that someone wrote out about this subject saying that they thought such and such should be done. That would have no materiality and no binding force or effect as between the parties to this litigation.

Mr. Gose: May I have Exhibit 22 to illustrate? If the Court please, on November 12, 1942 as shown by Exhibit 22, there was a meeting in San Francisco. And Mr. Middleton at that time was appointed chairman of a committee to see what could be done about working out a solution of this dispute that was pending concerning payment of the tonnage assessment. His committee returned a report, the final paragraph of which was a recommendation to the Coast Board of Trustees "that northern districts members be requested to forward to the Coast Board their recommendation as to above, together with any other recommendation on dividing tonnage charges between dock operators and stevedores where possible." That was on November 12. It in effect asked the Northern members to see what solution they could work out. This resolution was the first meeting of the Washington Board of which I am aware.

The Court: Let me see that exhibit:

Mr. Gose: I am in agreement with counsel that it is not finally binding, but I think——

The Court: I don't know how much importance Exhibit M will have in any decision to be made, but since Exhibit 22 has been admitted, it seems

(Testimony of K. J. Middleton.)

to me that the [292] defendant has a right to have Exhibit admitted.

Mr. Dobrin: Very well, your Honor.

The Court: Exhibit M is admitted. Objection overruled.

(Document previously marked Defendant's Exhibit M for identification was admitted in evidence.)

Mr. Gose: Just a minute. If your Honor please. Counsel has suggested that we might put in the entire resolution instead of,—I thought I had the entire one, but it seems I have only a portion of the one, and I am very happy to withdraw Exhibit M and have the entire resolution marked Exhibit M-1, let us say, and offer it in conjunction with Exhibit M.

The Court: Exhibit M-1. You may mark Exhibit M-1 as the entire resolution.

(Document referred to was marked Defendant's Exhibit M-1 for identification.)

Mr. Gose: And I am also offering Exhibit M-1 in evidence, being the copy of the resolution of November 24, 1942 of which Exhibit M is a part.

Mr. Dobrin: I renew that portion of my objection which would go to Exhibit M-1.

The Court: Exhibit M-1 is admitted. Objection overruled. There might seem to be no reason to allow Exhibit M to remain in evidence, but a part of the testimony would be hard to understand unless we had the brief extract in.

(Testimony of K. J. Middleton.)

(Document previously marked Defendant's Exhibit M-1 for identification was received in evidence.) [293]

(Letter dated December 11, 1942 from K. J. Middleton to R. C. Clapp, F. E. Settersten and H. A. Armstrong was marked Defendant's Exhibit N for identification.)

Q. Mr. Middleton, I am handing you Defendant's Exhibit N for identification, which purports to be an original letter from you to Mr. R. C. Clapp, F. E. Settersten and H. A. Armstrong, written under Date of December 11, 1942 on the letterhead of the Waterfront Employers of Washington. Is that such a duplicate original of such a letter?

Mr. Dobrin: What date is that?

Mr. Gose: December 11, 1942.

A. Yes.

Mr. Gose: I am offering this letter in evidence as another connecting event in what was done immediately after that committee meeting of November 12, 1942 in San Francisco.

Mr. Dobrin: What is that exhibit? N?

Mr. Gose: Yes.

Mr. Dobrin: Again, your Honor. I make the same objection to that letter as I did to the previous exhibits M and M-1. So that my point will be quite clear, the fact that there was activity locally in connection with this subject of tonnage assessment becomes quite immaterial in view of the fact that on May 26, 1943,—that is several months

(Testimony of K. J. Middleton.)

subsequent to the date of this letter, whatever had occurred up to that time was consolidated in a report in a proposal made by the Seattle representatives to the Coast Board and approved; and it seems to me to fill the record up with miscellaneous correspondence and action back of that which is not only useless but it is improper, and I [294] object on the ground that the letter is immaterial.

The Court: If it shall later be determined that the parties entered into a binding contract in May, 1943, of course, what transpired previously could not be allowed to influence the result. However, my recollection is that the plaintiff introduced a number of resolutions and documents dated prior to such alleged contracting date, and I doubt very much the propriety of my allowing some of what transpired before to be introduced as exhibits on one side and denying a request by the other. Objection overruled, and Exhibit N is admitted for what, if anything, it may be worth.

(Document previously marked as Defendant's Exhibit N for identification was received in evidence.)

Mr. Dobrin: May I make a statement in connection with your Honor's remarks?

The Court: You may.

Mr. Dobrin: Your Honor referred to the making of a binding contract in May 1943. I didn't want to give any impression that my remarks were leading to such a conclusion. Possibly your Honor

(Testimony of K. J. Middleton.)

doesn't recall, but the question as to whether or not this method of tonnage assessment should be changed or should not be changed and how it should be changed was a subject of discussion during the period 1942 and 1943, and finally in May of 1943 a final proposal was made by those who were discussing it to the Board, and that is what I had reference to.

The Court: Well, even on that theory, in view of what preceded it having been introduced, I am very hesitant about keeping out some more. I thought counsel was referring [295] to some promise of the defendant through Mr. Hay.

Mr. Dobrin: That came at a different time.

The Court: That was a different date?

Mr. Dobrin: Yes.

The Court: The ruling stands. Objection overruled.

Q. Defendant's Exhibit N, the letter of December 11, 1942 which we had just been discussing, is addressed to Mr. R. C. Clapp, Mr. F. E. Settersten and Mr. H. A. Armstrong. Would you be kind enough to identify each of those men to us? Who is Mr. R. C. Clapp?

A. He is the president of Rothschild Stevedoring Company.

Q. Which is an associate member, I think, of the Coast Association? A. Yes.

Q. And also is a member of the Waterfront Employers of Washington? A. Yes.

Q. Mr. F. E. Settersten, I believe, is president

(Testimony of K. J. Middleton.)

of Griffiths and Sprague Stevedoring Company, the defendant in this case?

A. I understand so.

Q. And an associate member of the Coast Association? A. Yes.

Q. And a member of the Washington Association? A. Yes.

Q. Mr. H. A. Armstrong,—who is he?

A. Western Stevedore Company.

Q. Western Stevedore Company?

The Court: What is he of that?

The Witness: I think he is manager of the company. [296]

Q. That company is a member of the Waterfront Employers of Washington? A. Yes.

Q. And an associate member of the Coast Association? A. Yes.

(Letter dated March 11, 1943 from Griffiths and Sprague by Mr. E. M. Hay to Waterfront Employers Association of the Pacific Coast was marked Defendant's Exhibit O for identification.)

Q. I am showing you, Mr. Middleton, Defendant's Exhibit O for identification and I want to ask you if you recognize what that is?

A. That is the proposed letter that Mr. Hay was to give to the Coast Association.

Q. Well, to orient ourselves, I think I will show you Plaintiff's Exhibit 25, which is already in evidence, a copy of a letter dated March 11, 1943 from Griffiths and Sprague Stevedoring Company by

(Testimony of K. J. Middleton.)

Mr. Hay to the committee of the Waterfront Employers Association of the Pacific Coast. Now, what is the relationship between Defendant's Exhibit O and Plaintiff's Exhibit 25?

A. (Pause.)

Q. Let me ask this——

A. (Interposing) They are the same.

Q. They are the same? A. Apparently.

Q. Let me ask this, is the writing in ink on Defendant's Exhibit O your handwriting?

A. It is.

Q. Did you put that writing in ink on Defendant's Exhibit O [297] as a model for Plaintiff's Exhibit 25 that was ultimately delivered?

A. I did.

Q. You did? A. I did.

Q. There are some pencil notations on Exhibit O. Are those also your handwriting?

A. No.

Q. Do you know whose they are? A. Yes.

Q. Whose are they? A. Mr. Bogle's.

Q. Mr Bogle's? A. Yes.

Q. Does Defendant's Exhibit O with the ink plus the pencil insertions finally express the form of letter that was written by Mr. Hay as Plaintiff's Exhibit 25? A. It does.

Mr. Gose: I am going to offer it in evidence, and I am giving counsel an opportunity to examine it.

Mr. Dobrin: That is objected to. As a part of our case in chief we offered in evidence and

(Testimony of K. J. Middleton.)

there was received in evidence a letter signed by E. M. Hay, Secretary of the defendant company, promising and agreeing to pay the tonnage assessment for which this suit is brought. That was part of our case in chief. Now comes the defendant for his defense and wishes to offer what is apparently a preliminary draft of the same letter. I object to it as immaterial.

Mr. Gose: I am entitled to show whose draftsmanship [298] any document is if there is any problem at all going to the construction of it. I think there are possibly a number of problems involved in the construction of this document. All I am offering it for is to show that it was drafted by the other side, and if there was any problem of construction, to avail myself of the rule that a document is most strictly construed against the draftsman. That is all. There is nothing to be frightened about.

Mr. Dobrin: No, but Mr. Hay is the man who signed it. He is an attorney of this Bar. You are not contending that he could not read what he had written there and what he signed, are you?

Mr. Gose: Not at all. I told you what I am offering it for.

Mr. Dobrin: I still object to it. There is no showing there is anything ambiguous about that letter. It is good plain English so far as I can read. It is a direct promise to pay the very assessment for which this suit is brought.

The Court: I don't think it makes very much

(Testimony of K. J. Middleton.)

difference whether Exhibit O is admitted in evidence or not. The evidence now shows that Exhibit 25, introduced by plaintiff, was written by this witness and modified by Mr. Bogle. I personally can see no difference whether I admit it or do not under the statement of counsel, under Mr. Gose's statement. What difference does it make if I admit it or not?

Mr. Gose: It permits me to avail myself of any argument as to construction, depending who drafted it. [299]

The Court: I say that is already in evidence. This witness admits he wrote it. That Exhibit 25 is what he wrote except as what he wrote was modified by what Mr. Bogle pencilled.

Mr. Dobrin: If your Honor please, maybe that is where the witness' testimony at the moment leads, although I don't care because it is my understanding that,—well, I probably shouldn't say what my understanding is.

The Court: Exhibit O is admitted. If there is going to be any controversy about what was done, it will be admitted in evidence.

Mr. Dobrin: Yes.

(Document previously marked as Defendant's Exhibit O for identification was received in evidence.)

Q. The Lawrence Bogle referred to in your testimony is a member of the firm of Bogle, Bogle & Gates, attorneys for the Coast Association?

(Testimony of K. J. Middleton.)

A. Yes, but Mr. Bogle was there as a trustee or director of the Coast Association.

Q. Of the Coast Association. He was also at that time acting as its attorney, was he not?

A. His firm; not himself.

Q. His firm? A. (No response.)

(Bulletins numbered 1200, 1201, 1202, 1203, 1204 and 1205 were marked Defendant's Exhibits P, Q, R, S, T and U for identification.)

Q. Mr. Middleton, does the Waterfront Employers of Washington act to some extent as a collector of this so-called tonnage tax for the Coast Association? [300]

A. In part.

Q. In part. In other words, some people paying that tax pay it to the Washington Association which in turn remits it to the Coast Association?

A. And some pay direct. The Washington Association merely acts as an intermediary and sometimes that is done for the convenience of the payers.

Q. Of the payers. I am handing you here, one, two, three, four, five, six separate documents marked Defendant's Exhibits P, Q, R, S, T and U, and they purport on their face to be respectively circulars 1200, 1201, 1202, 1203, 1204 and 1205.

The Court: 1200?

Mr. Gose: 1200 to 1205, inclusive.

Q. And they purport to have been issued by the Waterfront Employers of Washington and directed to the members of that organization. To be more

(Testimony of K. J. Middleton.)

precise, they purport to be issued by the Waterfront Employers of Seattle, predecessor of the Waterfront Employers of Washington. Are you familiar with those circulars?

A. No, I was not. I may have seen them in connection with Dodwell & Company's business, but that was before I had anything to do with—

Q. You have never had access to the files or seen them or known of them?

A. I assume they were in existence, but I have never examined them.

Q. You don't know whether they were authentic copies? A. No.

Mr. Gose: Counsel, are you disposed to question [301] the authenticity of them?

Mr. Dobrin: I never heard of them.

Mr. Gose: I will hold this for the time being and later identify them by one of my other witnesses.

Q. Now, Mr. Middleton, you were here when Mr. Boyd testified this afternoon, were you not?

A. Yes.

Q. I believe he testified among other things that the Ames Terminal was a member of the Coast Association. Are you familiar with that organization? A. Very slightly.

Q. Do you know what line of business it is engaged in here?

A. I understand they are acting as a terminal.

Q. Do you know if they hire longshoremen out of the hiring hall? A. I think so.

(Testimony of K. J. Middleton.)

Mr. Dobrin: Just a minute. I object to counsel leading the witness or guessing what this Ames Terminal does or what he thinks. If he knows, I have no objection.

The Court: Do you wish to strike his answer?

Mr. Dobrin: I move to strike his answer and object to both answers, the other one in which he says he thinks, and I forget what other expression he used.

Mr. Gose: After all, he is the president of the Association and has been in the shipping business for years.

Mr. Dobrin: He is your witness, and you should not lead him.

The Court: Motion to strike granted.

Q. Well, do you wish to indicate that you don't know what [302] line of business Ames Terminal is engaged in?

A. I told you I thought they were in the terminal business.

Q. I don't understand you.

A. I told you I thought they were in the terminal business.

Q. Do you know?

A. What is knowledge?

Q. Have you been there and seen what kind of business they are engaged in out there?

A. I haven't been myself personally.

Q. You have never been there? A. No.

Q. How about Western Stevedore Company?

(Testimony of K. J. Middleton.)

Do you know what line of business they are engaged in?

A. They are in the stevedore business.

Q. Do you know that?

A. I know that because they pay tonnage assessments.

Q. Do you know whether they sometimes do dock work with longshoremen obtained out of the hiring hall in Seattle on cargo that does not go aboard a vessel?

A. They do.

Q. When they do such work are they expected to pay any tonnage tax on account of it?

Mr. Dobrin: Just a minute, if the Court please. I object to that in the first place as a leading question to the witness and in the second place as being immaterial, as it has already been testified in this case, and this is part of their defense, to which the plaintiff agrees, that unless you load or discharge cargo, you don't pay a tonnage assessment. So I don't see any necessity of repetition. [303]

Mr. Gose: With that square concession in the record, I will not press the question.

Mr. Dobrin: It has been in here all through.

The Court: The question is withdrawn,

Q. Do you know what line of business Salmon Terminals is engaged in?

Mr. Dobrin: Mr. Reporter, please read my statement.

(Mr. Dobrin's statement read.)

A. Yes, they handle cases of canned salmon and recondition it if necessary.

(Testimony of K. J. Middleton.)

Q. Do they employ longshoremen from the local hiring hall for dock work as distinguished from loading cargo in and out of vessels?

A. Partly. Partly they engage whatever help they can get from any source.

Q. Do you know what line of business Rothschild-International Stevedoring Company is engaged in? A. That is stevedoring.

Q. Stevedores. Do you know whether they from time to time employ longshoremen out of the Seattle hiring hall for the purpose of doing dock work as distinguished from loading cargo in or out of vessels? A. They have done so.

Q. I am showing you Plaintiff's Exhibit 22, which is a copy of the resolution adopted by the Board of the Coast Association on November 12, 1942. There is incorporated as part of that resolution the minutes of a special committee meeting. In the first numbered paragraph of the report of that committee meeting there are the names of [304] various companies. I would like to ask you, the first name is Matson. To what company does that refer?

A. Matson Navigation Company.

Q. That is a steamship company, is it not?

A. It is.

Q. And a voting member of the plaintiff Association? A. Yes.

Q. The next name is Pope & Talbot.

Mr. Dobrin: Just a minute. I would like to ask a question. Do you know what Matson is,

(Testimony of K. J. Middleton.)

whether it is a steamship company or stevedore company, or are you just theorizing about it?

The Witness: The Matson Navigation Company is a steamship company. It also does its own stevedoring. I wasn't asked that question.

Q. I am essentially interested in whether it is in the steamship business and as such is eligible to be a voting member in the plaintiff Association. Pope & Talbot, are they engaged in the steamship business?

A. Under the name of McCormick Steamship Company.

Q. Through the McCormick Steamship Company. Who does Speer refer to?

A. A terminal operator in Portland.

Q. Luckenbach, to whom does that refer?

A. That is the Luckenbach Steamship Company. They also do their own stevedoring.

Q. They are also a voting member of the Plaintiff Association? A. Yes.

Q. Associated, to whom does that refer?

A. That is a terminal association in Los Angeles. [305]

Q. Rothschild, I believe is Rothschild Stevedore? A. Stevedore.

Q. Olympic, to whom does that refer?

Mr. Dobrin: Would you mind, if he makes an error while we are running through, to pick it up at the time instead of waiting until later?

Mr. Gose: Not at all.

Q. Who is Associated?

(Testimony of K. J. Middleton.)

A. I don't know its exact name. I think it is Associated Banning.

Q. What is it? In what kind of operation?

A. Stevedoring.

Q. All right. Olympic, who does that refer to?

A. Stevedoring.

Q. And Griffiths and Sprague is the defendant in this case, is that correct?

A. Stevedoring.

Q. Portland is stevedoring; and it says here "Pay through Moore-McCormick Company."

A. That is Pope & Talbot.

Q. That is Pope & Talbot? A. Yes.

Q. A steamship company? A. Yes.

Mr. Dobrin: Mr. Middleton, has Moore-McCormick anything to do with Pope & Talbot?

The Witness: I understand it is a subsidiary of Pope & Talbot.

Mr. Dobrin: Aren't you thinking of McCormick Steamship? [306]

The Witness: Pardon me, yes. Mr. Gose, I was wrong on Moore-McCormick. That is wrong. I was thinking of the McCormick Steamship Company. That is a different concern.

Q. Now, to get back to the Waterfront Employers of Washington, of which you are president, the members of that Association pay, I believe, on a payroll basis, do they?

Mr. Dobrin: Objected to as leading.

Mr. Gose: He is an adverse witness.

Mr. Dobrin: He is not adverse.

(Testimony of K. J. Middleton.)

Mr. Gose: He is vice-president of the plaintiff corporation.

Mr. Dobrin: He has not shown he is adverse to you in any way.

The Court: I think that until questions put in the ordinary way get no results, that you should follow the regular practice. Objection sustained.

Q. What, if anything, in the nature of dues do the members of the Washington Association pay for the support of that organization?

A. To the Washington Association?

Q. Yes.

Mr. Dobrin: Objected to as immaterial to any defense to this action. We are suing for a tonnage assessment due the Coast Association. Suppose they paid dues to the Elks Lodge, what has that got to do with it?

The Court: Objection overruled.

Mr. Gose: You may answer the question.

(Question read.)

A. They pay 1% of their payroll to cover the costs of collective [307] reporting and central pay office service, which is purely a local operation and has no relation to the Coast operation.

Q. That is 1% of their payroll?

A. Yes.

Q. You mean their payroll to longshoremen? Is that what you mean?

A. The payroll which they send in to the Association.

The Court: We will suspend for ten minutes.

(Testimony of K. J. Middleton.)

(Recess.)

Q. Does any part of that 1% payroll money or does any other money collected by the Washington Association go in any way to relieve any member of the Coast Association from any part of the burden of the 2½c tonnage tax by the Coast Association? A. It does not.

Mr. Gose: You may inquire.

Cross Examination

By Mr. Dobrin:

Q. Mr. Middleton, what was the occasion for your drafting or having anything to do with the document which is in evidence as Defendant's Exhibit O?

A. It was a meeting of the trustees of Washington and a committee from San Francisco at which Mr. Hay was present. He made a statement that they would pay the tonnage assessments up to the end of January of 1943. He came into my office later——

Q. (Interposing) Was that limited to paying them to the end of January, 1943?

A. No. Thereafter they would pay the tonnage assessment as [308] assessed by the Coast Association. He came into my office to discuss this matter afterwards, and I suggested we would like a letter to that effect, and this was the draft of the letter that we were to receive.

Q. Who was present while that draft was being made?

(Testimony of K. J. Middleton.)

A. Mr. Bogle, and in the early part of the meeting Mr. Settersten.

Q. And after the letter was drafted did you discuss it with anyone representing the defendant for the purpose of having them prepare such a letter?

A. I told Mr. Hay this was the letter we would accept.

Q. And where was Mr. Hay when you told him this? A. In my office.

Q. Prior to that had Mr. Settersten suggested some different offer that they would make?

A. Mr. Setterstein came in and said, "We will pay," and then he mentioned a specific amount. I am not clear in my memory what it was. I think it was in the neighborhood of \$20,000. And I said they were required to pay the tonnage assessments on the actual tonnage handled, the tonnage to be determined.

Q. When Mr. Hay was present,—did he come in after you had drafted this document represented by Exhibit O?

A. No, he was present at the time.

Q. Oh, he was present while it was being drawn?

A. Yes.

Q. In the room? A. Yes.

Q. With you and Mr. Bogle?

A. Yes. [309]

Q. And after it was drawn did you hand it to him?

A. Yes, and Mr. Hay said he would sign it as attorney, and I said that the Association would

(Testimony of K. J. Middleton.)

not accept it, and Mr. Hay said, "Well, I am secretary of the company." I said, "Very good. That is perfectly satisfactory to us if signed as secretary of the company."

Q. What happened to this document marked Exhibit O after the conversation?

A. This is the first time I have seen it since then.

Q. Who took it away?

A. Mr. Hay took it away.

Q. And then did you receive the original of which Exhibit 25 is a copy? A. Yes.

Q. And on whose letterhead was that written?

A. On Griffiths and Sprague's.

Q. And signed by Mr. Hay?

A. Signed by Mr. Hay as secretary.

Q. Was that delivered to you or how did it reach you, do you recall?

A. I don't recall how it came to my office.

Q. Do you recall whether it was delivered to you personally or mailed to you?

A. No.

Q. This meeting that you spoke about occurred on March 10, 1943, did it not? A. Yes.

Q. You received a letter back signed by Mr. Hay the next day, is that correct?

A. I don't remember the date. [310]

Q. You don't remember the date. Well, if the letter shows it is March 11, would it refresh your recollection?

A. If it is an exact copy, yes.

(Testimony of K. J. Middleton.)

Q. Now, referring, Mr. Middleton, to the Western Stevedore Company which has been mentioned here, do they load and discharge cargo in the Puget Sound area? A. Yes.

Q. Do they pay the tonnage assessment to the Coast Association? A. Yes.

Q. Does the Rothschild Stevedoring Company load and discharge cargo in the Puget Sound area? A. Yes.

Q. Do they pay their tonnage assessment to the Coast Association? A. Yes.

Q. I show you Exhibit 22, which is minutes of meeting of special committee as shown on that exhibit, and I call your attention to the names under numbered paragraph 1 of that exhibit, the first name being Matson. What Matson does that refer to, do you know?

A. Matson Navigation Company.

Q. Are you sure that was not Matson Terminals? A. I am not sure.

Q. So you don't know whether it was Matson Terminals or Matson Navigation Company?

A. I think the same man represents both companies.

Q. Is that company engaged in stevedoring business?

A. It does its own stevedoring.

Q. So it is engaged in stevedoring?

A. Yes. [311]

Q. And was at the time of this meeting in November 1942? A. Yes.

(Testimony of K. J. Middleton.)

Q. Pope & Talbot is the next name that appears on the list, and does Pope & Talbot do its own stevedoring?

A. Well, it is the McCormick Steamship Company, a division of Pope & Talbot; yes, it does its own stevedoring.

Q. In other words, Pope & Talbot is just a name,—McCormick Steamship Company, Division of Pope & Talbot, is just a name, I should say, and it does its own stevedoring? A. Yes.

Q. And did it in November of 1942?

A. Yes.

Q. And the next matter I want to call your attention to, the next name is Speer. Is that a Portland concern?

A. Yes, he operated a terminal at Portland.

Q. Now, the next is Luckenbach Steamship—it is called Luckenbach here. Is that the Luckenbach Steamship Company? A. Yes.

Q. Is that a steamship company? A. Yes.

Q. Does it do its own stevedoring?

A. Yes.

Q. Did it do so on December 12, 1942?

A. It did.

Q. The next is Associated, and I think your testimony was that it is Associated Banning of San Francisco and San Pedro.

A. I said San Pedro, but they also operate in San Francisco.

Q. And is that a stevedoring concern? [312]

A. Yes.

Q. And was it in November 1942?

(Testimony of K. J. Middleton.)

A. Yes.

Q. The first name in the second column is Rothschild. That is a stevedoring company on Puget Sound, is it not?

A. Yes.

Q. And Olympic is a stevedoring company on Puget Sound, is it not?

A. Yes.

Q. And W. J. Jones is a stevedoring company in Portland, is it not?

A. Yes.

Q. And Rothschild, Olympic and W. J. Jones were such stevedoring companies in November, 1942, is that correct?

A. Yes.

Q. Griffiths and Sprague is the next name. They are stevedores and were in November 1942?

A. Yes.

Q. Who is referred to as Portland, that last name?

A. Portland Stevedoring Company in Portland.

Q. Is that a stevedoring company in Portland?

A. Yes.

Q. Were they a stevedoring company in November 1942?

A. Yes.

Q. Now, with reference to these companies that may act as general agents for War Shipping Administration and whom you testified do their own stevedoring, do they do the stevedoring for War Shipping Administration vessels for which they act as general agents?

A. I don't know. [313]

Q. You don't know. Now, do all of those concerns whose names I have read off on this Exhibit 22 who load and discharge cargo for the United States Navy, United States War Shipping Admini-

(Testimony of K. J. Middleton.)

istration and the United States Army except Griffiths and Sprague pay their tonnage assessment to the Coast Association? A. Yes.

Mr. Dobrin: That is all.

Mr. Gose: That is all.

(Witness excused.)

F. E. SETTERSTEN

being first duly sworn, testified on oath in behalf of the Defendant as follows:

Direct Examination

By Mr. Gose:

Q. Will you state your name, please?

A. F. E. Settersten.

Q. Where do you live, Mr. Settersten?

A. Seattle.

Q. And what is your occupation?

A. President of Griffiths and Sprague Stevedoring Company.

Q. What business is Griffiths and Sprague Stevedoring Company engaged in?

A. In the stevedoring business.

Q. It is not the steamship business.

A. No, sir.

Q. Has it ever been? A. No, sir.

Q. Does it ever expect to be in the reasonably near future [314] that you know of?

A. No, sir.

(Testimony of F. E. Settersten.)

Q. How long have you been connected with this company, Mr. Settersten?

A. Since about 1937.

Q. Since June 1937. Directing your attention to the period from that time to the present, has the defendant Griffiths and Sprague Stevedoring Company performed stevedore service consisting of loading or unloading vessels owned or operated by steamship companies who are members of the plaintiff corporation? A. They have.

Q. During that period has the defendant ever reported any tonnage so handled for any such member company to the plaintiff Association?

A. We have not.

Q. Has it ever been suggested to your knowledge that the defendant should have made such a report with respect to such a cargo?

A. No, sir.

Q. During the period with respect to that cargo has the defendant company ever paid any tonnage tax on cargo loaded or unloaded for member steamship companies? A. They have not.

Q. Has it ever been suggested to your knowledge that they were obligated to make payments on that account? A. No, sir.

Q. What was your understanding as to who should pay the tonnage tax on cargo that the defendant company handled for member steamship companies? [315]

Mr. Dobrin: Objected to as immaterial.

(Testimony of F. E. Settersten.)

Mr. Gose: Mr. Foisie testified his understanding in considerable detail on that subject.

Mr. Dobrin: I don't agree with you that he has.

The Court: Is there a disagreement on that?

Mr. Gose: There is a disagreement on that subject.

The Court: Did he testify as to that?

Mr. Dobrin: He testified as to what the records of resolutions of the plaintiff Association provided for.

The Court: Did he testify to nothing except resolutions?

Mr. Dobrin: That is my recollection with reference to that, your Honor.

Mr. Gose: It is my recollection he testified repeatedly as to what the construction of those resolutions was. The resolutions don't say in so many words; they say a tax of so much per ton. They don't say what class of members pay it.

(Court refers to transcript of testimony given at previous hearing.)

Mr. Dobrin: I want to make the further objection that it appears from the record in this case that the only tonnage assessment that the defendant has failed to pay is tonnage assessment for cargo handled for the United States Army, and the resolutions of the plaintiff corporation require the payment of the tonnage assessment on such cargo specifically. So, to me, the question is—

Mr. Gose: (Interposing) Counsel knows very well— [316]

(Testimony of F. E. Settersten.)

The Court: (Interposing) Just a minute. I have reserved ruling. In due course I will be better able to rule. You may proceed.

Mr. Settersten, I am going to show you Defendant's Exhibits P, Q, R, S, T and U, inclusive, and I want to ask you if you know what those are.

A. Well, they all seem to bear on circulars from the Waterfront Employers of Seattle by Mr. Dawson in regard to the tariff on cargoes inbound and outbound, also payroll assessments.

Q. Do you know where they came from?

A. From our files.

Q. Where did you receive them?

A. From the Waterfront Employers of Seattle at that time, I believe.

Q. Now, let's take them singly. Defendant's Exhibit P bears date of December 3, 1937?

A. Yes.

Q. Do you know whether the defendant company received that on or about that date?

A. Yes, shortly after that date we received it, being a member of the Waterfront Employers of Seattle.

Q. Defendant's Exhibit Q bears date June 18, 1938. Do you know whether you received that on or about that date?

A. Yes, the same as the other.

Q. Defendant's Exhibit R bears date July 29, 1939.

A. July 27.

Q. July 27, 1939. Do you recall whether you received that on or about that date?

(Testimony of F. E. Settersten.)

A. Shortly after that date we received it. [317]

Q. Defendant's Exhibit S bears date February 26, 1940. Do you know whether you received that on or about that date? February 26, 1940?

A. That is right.

Q. Defendant's Exhibit T bears date October 1, 1940. Do you know whether you received that on or about that date?

A. That is right; we did.

Q. And Defendant's Exhibit U bears date January 7, 1941. Do you know whether you received that on or about that date? A. That is right.

Mr. Gose: I offer each and all of these exhibits, Defendant's Exhibits P, Q, R, S, T and U, in evidence for one purpose only, to show that in every instance there is a statement that stevedores are not required to report tonnage of member lines; that members in every instance—I am not interested in the other material, although it will do no harm.

Mr. Dobrin: We object to the offer of Defendant's Exhibits P, Q, R, S, T, and U and each of them for the reason that these, as they show on their face, are circulars sent out by one W. C. Dawson, Treasurer of the Waterfront Employers of Seattle, the predecessor of the Waterfront Employers of Washington, and the same W. C. Dawson is treasurer of the Waterfront Employers of Washington. Whatever statement Mr. Dawson may make as to what stevedores are required to do is in no way binding upon this plaintiff Association.

(Testimony of F. E. Settersten.)

Mr. Gose: With regard to that objection, it is in evidence by Mr. Middleton, who just testified, that the [318] Washington Association acted as the collecting agent for the Coast Association for the purpose of collecting this 2½¢ tonnage tax. Certainly the statement of the collecting agent with regard to the obligations of these stevedore operators is binding upon its principal, the plaintiff Association.

Mr. Dobrin: And I want to add this further objection, why go back into ancient history? In this case there has been introduced in evidence resolutions of the Board of the plaintiff, the last one in 1942, levying the very assessment for which this suit is brought, and I don't see why we should go back to 1937 to find out what a Mr. Dawson, then treasurer of another association, said. I don't see how it has any bearing on the issues in this case.

Mr. Gose: If the Court please, counsel apparently has not read the brief. I would like to answer that last statement if your Honor cares to examine the exhibit first.

Mr. Dobrin: I don't know what brief you refer to, but I have read every one handed to me.

Mr. Gose: One of the defenses raised in this case by an affirmative defense and one of the subjects argued in the brief is that this plaintiff corporation is without constitutional power to tax an associate member. Our point is that if there is any ambiguity in the Constitution and by-laws on that subject, the practice resolves the question.

(Testimony of F. E. Settersten.)

Those exhibits and also the previous one on which there is a reservation of ruling establish the proposition that, from our standpoint there was a practical [319] construction that the only persons who should pay for the support of this organization were the voting members. What I am trying to show by the question on which your Honor reserved ruling and these exhibits is that for years these stevedores were advised by the collecting agent that they were under no duty to report the tonnage handled for member steamship companies because those companies reported their own. It is the steamship company who pays.

There is another one about non-member companies, but that was a special resolution of May 8, 1940, and that was predicated on the consent of the stevedores. They had to sign a formal agreement on that occasion. This ties in very definitely with the affirmative defense that this class of member is not taxable at all under the Constitution and by-laws of this Association.

Now, I may say this further, if the point is not well taken, when your Honor makes his decision the evidence will not have any bearing one way or the other. But we will get along a lot faster if I may introduce these things which under our theory of the case are admissible, and we can argue about their validity later on.

Mr. Dobrin: If the Court please, as I understand it, there is no issue involved here as to our suing this defendant for cargo loaded and dis-

(Testimony of F. E. Settersten.)

charged for a member. At least, I don't understand that you are making any such issue.

Mr. Gose: I say the history bears on the construction.

Mr. Dobrin: I say it is immaterial. [320]

The Court: Counsel says that the only reason he wishes to offer this is for the purpose of showing that each of these exhibits for identification P to U, inclusive, contains the statement that the stevedores are not required to report tonnage of member lines. As to the question put to this witness concerning which I reserved the ruling, reference to the testimony of Mr. Foisie shows that his testimony was quite general. He started early; he covered much territory. Objection overruled, and the witness may answer.

(Question read as follows: "What was your understanding as to who should pay the tonnage tax on cargo that the defendant company handled for member steamship companies?")

A. The agent or the steamship owner.

Q. By the way, did you ever act as agent for a steamship company? A. No, sir.

The Court: I will say as to Exhibits P to U, inclusive, at the present time, at least, I am going to reject Exhibits P to U, insclusive.

Mr. Gose: Then, if the Court please, may I offer in evidence only that single sentence of those exhibits to which I alluded previously, that the stevedores are not obligated to report the tonnage for

(Testimony of F. E. Settersten.)

member steamship companies, only that single sentence which appears in each exhibit?

Mr. Dobrin: I renew my objection.

The Court: Exhibits P, Q and R as limited to a specific sentence are again rejected. The single sentence [321] in Exhibits S, T and U; well, I don't think I am permitted to admit them in evidence. The first three are rejected because they are of the Waterfront Employers of Seattle. The only basis for admitting them would be the testimony of Mr. Middleton that the Waterfront Employers of Washington acted as agent in collections on occasions as accommodation sometimes for the payers; but even Exhibits S, T and U, which purport to be by the Waterfront Employers of Washington, were prior to the time he has acknowledged any knowledge. Exhibits S, T and U as to the single sentence are rejected.

Mr. Gose: I will endeavor to qualify those later on. I may say in connection with that offer, for the Court's information, I would like to call attention—going back to the origin of the Coast Association. I call your Honor's attention to Page 118 on the record in this case, where under direct examination counsel asked Mr. Foisie, "Question: From the beginning of the Association up to the present, has it always been the position of the Coast Association that whoever the member may be who loads and discharges the ship, that he is required to pay the tonnage assessment? Answer: Yes." It is that form of testimony running up and down through

(Testimony of F. E. Settersten.)

several subsequent pages on the same subject matter which is the reason I wanted to show from the inception all local stevedores were not so instructed.

Q. Mr. Settersten, there is in evidence Exhibit 10, which includes among other things a memorandum agreement purporting to be signed by Griffiths and Sprague Stevedoring Company by Mr. Weber and conceded by us to be signed by [322] him.

A. That is right.

Q. Were you familiar, Mr. Settersten, with that memorandum of agreement?

The Court: What date is that?

Mr. Gose: May 9, 1940.

Q. At that date, on May 9, 1940, or thereabouts?

A. That is right. I was familiar with that.

Q. I will state to you, Mr. Settersten, that the words "non-member steamship company" are employed in there. Whom did you understand to be comprehended within that term?

Mr. Dobrin: Objected to as immaterial. For instance, a steamship company is either a member or not a member. I don't see——

Mr. Gose: (Interposing) There is certainly a possible ambiguity as to whether it includes the United States Army, which is the contention of my adversary.

Mr. Dobrin: You don't contend that they are members?

Mr. Gose: I contend that resolution has no bearing, that it relates only to a private non-member

(Testimony of F. E. Settersten.)
company. You are contending in many places that it pertains to the U. S. Army.

The Court: Let us see. Does the plaintiff so contend?

Mr. Dobrin: Oh, yes, anyone who is not a member is a non-member.

Mr. Gose: Is a non-member company.

The Court: Objection overruled. [323]

Q. What do you understand to be the meaning of the words "non-member steamship company" as contained in that exhibit?

A. A ship that might have come in on commercial business and was not a member of the Association. Consequently, it would not pay the dues unless someone had taken care of it.

Q. Did you understand it to be a ship operated by the United States Army? A. No, sir.

Q. Now, the defendant has some contracts now for the loading of Army ships, hasn't it?

A. That is right.

Q. I trust counsel will not object to leading a little bit, he having put his evidence in, Exhibits 37, 38 and 39. Those are the contracts which you had from August, 1942, down to June 30, 1945? The last one expires that date, does it not?

A. That is right.

Q. Those are the contracts involved with the United States Army?

A. Those are the contracts, yes, sir.

Q. By what method did you obtain those contracts? A. On bid.

(Testimony of F. E. Settersten.)

Q. Competitive bids? A. Yes, sir.

Q. And upon what basis is the charge made for the work of loading and unloading vessels?

Mr. Dobrin: Just a minute. I think the contract speaks for itself. [324]

Mr. Gose: I think it does, but I didn't think you would mind if he said on a per ton basis.

Q. It does, doesn't it?

The Court: He is objecting. Objection sustained.

Q. There are some references to extra work in those contracts. Does that extra work comprehend loading and unloading cargo?

Mr. Dobrin: Just a minute. I think if he is going to talk about any detailed contract, he should point to the part that he is talking about so that we can see it.

The Court: I think so.

Mr. Gose: I think it is unnecessary to ask the question. The contract shows what I thought we might, for the convenience of the Court, show orally, but we will take care of that in argument.

Q. Now, Mr. Settersten, there is some evidence here, as I read it anyhow, that if you were not a member of any association, the Coast Association or the Waterfront Employers of Washington, you would be subject to a charge of 4c per man-hour for obtaining men out of the hiring hall.

Mr. Dobrin: Just a minute. I object to counsel making a statement which is not a question——

The Court: (Interposing) I think so.

(Testimony of F. E. Settersten.)

Mr. Gose: If the Court please, counsel himself put in an exhibit—may I have Exhibit 11?

Q. Mr. Settersten, I will show you Plaintiff's Exhibit 11, which reads as follows, "Be It Resolved that effective May 1, 1940, each port association levy against non-members [325] an assessment of 4c per man hour for all longshoremen ordered and dispatched from the hiring hall to perform their work and that all man-hour assessments collected be remitted to the Waterfront Employers Association of the Pacific Coast as a part of the general funds of said Association." Do you know, Mr. Settersten, what the approximate relative cost of paying that form of assessment rather than the 2½c per ton tonnage tax would be to your company? Do you know approximately?

A. Approximately, yes. With a 13-man gang, this would result in 52c, whereas we compute 15 tons per gang hour. At 2½c it would be 37½c.

Q. Do you mean to indicate that if you had to pay the 4c per man hour, you would have to pay about 52c an hour—

A. Yes.

Q. —as against 37½c under the 2½ tonnage tax?

A. That is right.

Q. I think you said you were with the defendant company back to about 1937.

A. Yes.

Q. How long have you been familiar with this Waterfront Employers of Washington?

A. Oh, since back about 1929 I imagine.

Q. Did it have that association name all the time?

(Testimony of F. E. Settersten.)

A. It was formerly the Waterfront Employers of Seattle, I believe.

Q. What is the relationship of the Waterfront Employers of Washington to the Waterfront Employers of Seattle?

A. I think that was the start of the thing in Seattle, and that was the first name, I take it, and then it was later [326] changed to Waterfront Employers of Washington.

Q. Do you know W. C. Dawson?

A. I do.

Q. Do you know what his position was with the Waterfront Employers of Washington?

A. Treasurer, as I understand it.

Q. Did he previously have a position with the Waterfront Employers of Seattle?

A. Yes, as treasurer.

Q. Do you know whether the Waterfront Employers of Seattle claimed the right to collect this 2½¢ tonnage tax on behalf of the plaintiff Association from 1937 on?

Mr. Dobrin: Just a minute. Objected to as leading.

The Court: Objection sustained.

Q. Do you know whether anyone did pay tonnage tax to the Waterfront Employers Association of Seattle from 1937 on to the plaintiff Association?

A. That I don't know. Some companies paid locally and some in San Francisco, I understand.

Mr. Dobrin: I move to strike the witness' answer as apparently he doesn't know.

(Testimony of F. E. Settersten.)

The Court: Stricken.

Mr. Gose: Very well. You may inquire.

Cross Examination

By Mr. Dobrin:

Q. I just want to see if I get these mathematics. You are using as a basis for your mathematics a 13-man gang? A. That is right.

Q. Just tell me again what you testified to because I didn't follow you.

A. 4c per man hour for a 13-man gang would be 52c. For an average gang hour, 15 tons at $2\frac{1}{2}c$, you have $37\frac{1}{2}c$.

Q. In other words, you figure those 13 men would——

A. Produce 15 tons per gang hour.

Q. Produce 15 tons? A. Yes.

Q. Mr. Settersten, if you considered that Exhibit 10, which bears the signature of Griffiths and Sprague Stevedoring Company, applied only to non-member commercial vessels, why did Griffiths and Sprague Stevedoring immediately in 1940 commence paying the tonnage assessment on cargo loaded and discharged for the United States Army?

A. Well, once we found out that we shouldn't pay it, why, we stopped.

Q. Mr. Settersten, you paid it since the date you signed or almost immediately after you signed that contract, Exhibit 10, right down to and including December of 1942.

A. Jay Weber signed that.

Q. Yes, but you have paid on cargo loaded and

(Testimony of F. E. Settersten.)

discharged for the United States Army and other government agencies from the time of the signing of the agreement, Exhibit 10, down to and including the end of the year 1942?

A. We paid, yes, sir, that is right.

Q. And my question is, if you thought that this agreement, Exhibit 10, didn't apply to you as to Army vessels, why did you commence paying the tonnage assessment on those vessels in 1940?

A. It took a little time to learn about it. [328]

Q. It took all of 1940, 1941 and 1942?

A. I don't believe all of 1942.

Q. At least, it took all of 1940 and 1941 and some part of 1942 to find out about it?

A. Granted.

Q. That is your explanation?

A. Yes, sir.

Q. Where were you looking to find out about this? A. Public policy.

Q. Oh, you were looking for some public policy?

A. Yes, sir.

Q. Well, to tell the truth, Mr. Settersten, isn't this about the size of it, that after you had made a written promise to pay the tonnage assessment, for which this suit is brought, that then for the first time you attempted to find out if there wasn't some way of your getting out of this?

A. Yes, because there was supposed to be some help coming from San Francisco which didn't materialize.

Mr. Dobrin: That is all.

(Witness excused.)

EDWARD M. HAY,

being first duly sworn, testified on behalf of the Defendant as follows:

Direct Examination

By Mr. Gose:

Q. State your name. A. Edward M. Hay.

Q. What is your occupation? [329]

A. Lawyer.

Q. You live in Seattle? A. I do.

Q. And have for a good many years?

A. Yes.

Q. What is your connection with the defendant in this case? A. I am secretary.

Q. Are you also normally acting as its attorney?

A. Yes, I have for quite a number of years.

Q. When did you first become at all familiar with the fact that there might be some controversy between the defendant and the plaintiff concerning this tonnage tax?

A. I think it was in the spring or summer of 1942.

Q. Were you familiar with it in a general sort of way from that time on until March 1943?

A. I think so.

Q. Your name has been used a good deal by the witnesses. You had, did you not, some meetings on March 10 and 11, 1942, with certain representatives of the plaintiff—March 10 and 11, 1943, I mean?

A. Yes.

(Testimony of Edward M. Hay.)

Q. Will you tell us when the first of those meetings took place and what occurred?

Mr. Dobrin: What meeting are you referring to?

Mr. Gose: I will direct his attention specifically.

Q. Directing your attention specifically to the meeting in the morning of March 10, 1943, there was such a meeting, wasn't there?

A. There was. That was a meeting between representatives of Griffiths and Sprague Stevedoring Company and the so-called [330] San Francisco Committee, which had come up to discuss the matter of so-called delinquencies of my client and some of the officers of the local Association, Mr. Middleton and Mr. Bogle.

Q. Will you tell us what transpired at that time?

A. Mr. Middleton, as I recall, opened the meeting with the statement that——

Mr. Dobrin: (Interposing) Just a minute. If the Court please, I want to object to any testimony about anything except with reference to the agreement which Mr. Hay signed. In other words, what discussions went on prior to his signing his name as secretary of this company promising in writing to pay the tonnage assessment that we are suing on is quite immaterial. There is no allegation in this defense that he was defrauded in any manner at all, and what discussion preceded the signing of that agreement is immaterial.

Mr. Gose: If Your Honor please, I have a difficult time with counsel getting him to stay on one goal or the other. In the early stage of this case

(Testimony of Edward M. Hay.)

the first thing we did was to call for a Bill of Particulars asking about this agreement, and he came back with a Bill of Particulars, and Paragraph 3 says that the agreement of the defendant to pay the tonnage tax mentioned in Paragraph 5 of the Complaint was both written and oral and consists in addition of a series of acts out of which defendant's obligation arises. Now, he doesn't claim that there is any written agreement in which everything is concentrated. Under the circumstances I am entitled to show the facts surrounding it. That is all I wanted to [331] do very briefly.

The Court: Objection overruled.

A. Mr. Middleton, as I recall, called this meeting to order. There were present Mr. Settersten and Mr. Weber, and I represented the company. Mr. Bogle was present, and Mr. Middleton in opening it stated that the Committee had come up from San Francisco for the purpose of discussing my client's delinquency in the payment of the tonnage assessment. The Committee, I think principally through Mr. James, one of the members, stated also that they were there to iron out any misunderstandings that there might be between my client and the Association and that they were prepared to offer any help or explanation or assistance that they could to reach an amicable settlement. My client had a number of proposals that it wanted to make to the Committee, and it made the proposals. They were to make various changes of one sort or another, the details of which I don't now recall. The Commit-

(Testimony of Edward M. Hay.)

tee, however, stated that they had no authority whatsoever to bind the Association, that they were there simply to find out if we were going to pay and to help us in any way that they could to get us to pay. I said that I had previously rendered an opinion to my client to the effect I felt there was no legal liability for the payment of the tonnage tax, and I asked if the Committee had any brief or letter from the Association counsel, Mr. Harrison, I think it is, bearing on the subject and they said they had not. I asked Mr. Bogle if he had anything, and he said he did not. He and I then adjourned for a little conference by ourselves to discuss the legal side of it, [332] and my clients, Mr. Settersten and Mr. Weber, went off with the Committee to discuss some practical sides of the issue. Mr. Bogle advanced as an argument why we should pay the fact that our company had been receiving the benefits that the Association gave to its members, that he had discussed the matter with Mr. Harrison and that it was Mr. Harrison's conviction that if we weren't liable for the 2½¢ tonnage tax, at least, we would be liable on a quantum meruit basis. He also argued that this situation that had arisen as a result of the war was a unique one in that the steamship companies had lost their vessels largely——

Mr. Dobrin: (Interposing) Now, if the Court please, I don't want to interrupt again, but I am going to object to this line of testimony.

The Court: I think that the witness has covered

(Testimony of Edward M. Hay.)

more territory than counsel indicated in his question.

Mr. Gose: I asked him to tell what transpired at the morning meeting.

The Court: He has stepped away from the morning meeting, and he is gotten into a private consultation with Mr. Bogle.

Mr. Dobrin: I want to move to strike the testimony in reference to the conversation with Mr. Bogle.

The Court: The testimony with reference to the conversation with Mr. Bogle away from the Committee is stricken.

Q. When did you again have occasion to deal with the Committee, Mr. Hay?

A. I think we got together with the Committee two or three [333] different times that morning. It is a little bit hazy in my mind.

Q. May I ask this, did you come to any conclusions at that morning meeting where you discussed it? A. We did not.

Q. Following the morning of March 10, 1943, when did you again have any occasion to meet with the Committee?

A. The Committee and all those that were present in the morning meeting met again in the afternoon with a number of other people——

Q. (Interposing) Just a moment at that juncture. I will show you Plaintiff's Exhibit 24, which is the minutes of a meeting of the Board of Trustees of the Waterfront Employers of Washington, the

(Testimony of Edward M. Hay.)

body of which Mr. Dobrin says has nothing to do with this case. Is that where you again met the San Francisco Committee?

Mr. Dobrin: Just a minute. I wish to strike the question as containing a statement not addressed to the witness.

The Court: Yes, the whole question is stricken.

Mr. Gose: Very well.

Q. Did you again meet with the Committee from San Francisco at this meeting which is covered by Plaintiffs Exhibit 24? A. Yes, we did.

Q. The minutes described certain matters that occurred there, but I note that it says at one juncture the meeting recessed to allow the San Francisco Committee to meet with Messrs. Griffiths and Sprague. Do you know anything about that? [334]

A. Yes, they did recess, and we did meet.

Q. What happened during the course of that meeting during the recess?

Mr. Dobrin: If the Court please, I am going to renew my objection to matters that preceded the signing by Mr. Hay as secretary of this company of the written promise to pay these assessments because all we are doing is getting into negotiations between himself and this Committee as to what, if anything, they would do, and he finally did something. Now, what preceded that is of no importance except to get us far afield on another wild goose chase.

The Court: Objection overruled.

A. We met, and at this meeting, in addition to

(Testimony of Edward M. Hay.)

the Committee there were present three other stockholders.

Q. Who were they?

A. Mr. Colman, Mr. D. K. McDonald, and Mr. Jim Griffiths; and the whole issue was again re-hashed, principally for the benefit of these stockholders. Thereupon the Griffiths and Sprague group met and discussed the matter privately and then they came back and talked to the Committee and said that we had concluded in view of the argument that had been presented and the war situation that we would renew or resume the payment of the tonnage assessment.

Q. On Army cargo? A. On Army cargo.

Q. What happened then after you told them that?

A. The meeting was then convened again.

Q. Did you go back into the meeting at that time? [335] A. I did.

Q. I note that the minutes state that at 4:00 p.m. the meeting resumed with Messrs. Settersten and Hay present. "Mr. Hay stated after discussion with the Committee his client felt that they had a moral obligation to pay. After some discussion Mr. Hay submitted the following written statement." Will you give us your recollection of how you happened to submit a written statement at that time?

A. I made the oral statement to the meeting at the request of Mr. Middleton. Mr. Ringenberg, the secretary who was taking the minutes, came over to me after I had completed the statement and said

(Testimony of Edward M. Hay.)

he had not been able to get it down and would I please write it out.

Q. And did you then write the statement?

A. And I wrote then what is there contained.

Q. In the minutes of the meeting of March 10, 1943?

A. That is correct.

Q. Very well. The minutes go on to say that the memorandum referred to in the above statement was drafted subsequently in the form of a letter and signed by Mr. Hay as secretary of Griffiths and Sprague Stevedoring Company. It reads—and sets forth the body of the letter which is Plaintiff's Exhibit 25. When, actually, Mr. Hay, was the original document, copy of which is in evidence as Plaintiff's Exhibit 25, signed?

A. It was actually signed on March 11, the following day.

Q. I am showing you Defendant's Exhibit O. That is the document that Mr. Middleton testified he prepared in his handwriting. Do you know when that was prepared? [336]

A. That was prepared on March 11.

Q. Morning or afternoon?

A. Afternoon.

Q. That, of course, was the day following the day of that meeting that you just testified to?

A. That is correct.

Q. Will you tell us what the circumstances were concerning the giving of that letter? What transpired at the time you gave it?

A. I think at the very end of my written statement made at the meeting on the 10th was the

(Testimony of Edward M. Hay.)

statement that the method of payment would be arrived at with the San Francisco Committee. I don't know just how it was arranged, but the following morning I went over to Mr. Middleton's office.

Q. May I interrupt you? Did you meet subsequent to March 10, 1943? Subsequent to the meeting did you meet with that San Francisco Committee again? A. No, we never did.

Q. Was that the statement that you made at that meeting that was not carried out if I understand?

A. That is correct. I went over to Mr. Middleton's office, and he stated that the Committee itself was busy but that he was an officer of the Coast Association and he could conduct the matter with me. Mr. Bogle was present at the time. Mr. Middleton said he thought a good way to resolve this thing was for my client to give a promissory note. I objected to that, and I told him I wouldn't consent to my client's giving a note because I did not want to change its relationship to the Association, its [337] legal relationship. Thereupon he said, "Well, are you not willing to state what your client is going to do?" And I said, "Certainly," and he said, "Are you willing to put it in writing?" And I assured him that I was. He said, "Will you do so?" And I said I would. I thereupon went back to my office and prepared a letter which I brought back to Mr. Middleton on my own letterhead and signed by me, stating what my client would do.

(Testimony of Edward M. Hay.)

That, he said, was not satisfactory, and he then prepared Defendant's Exhibit O which I then took back to my office and prepared on Griffiths and Sprague's stationery, signed it and sent over by messenger to Mr. Middleton's office.

Q. And was the purpose of all that in execution of what you had said in the meeting in the day before? A. That is right.

Mr. Dobrin: Objected to as leading.

Mr. Gose: Pardon me. I was trying to save time.

Q. What was the purpose?

A. The purpose——

Mr. Dobrin: Objected to. It speaks for itself. You don't need to ask the purpose.

Mr. Gose: I am just trying to connect it up as one transaction. I think that is apparently the case, but I see no harm.

The Court: If the letter apparently shows the purpose, I see no reason to overrule the objection.

Mr. Gose: Will you read the question?

The Court: I see no reason why Mr. Dobrin's objection should not be sustained.

Q. Was there any other meeting between the time of the [338] adjournment of the meeting of the Trustees of the Washington Association and this meeting that you had with Mr. Middleton? Any other meeting in which you participated on this subject? A. No.

Mr. Gose: You may inquire.

(Discussion off the record concerning adjournment.)

The Court: Is there any reason we should not adjourn to 9:50 tomorrow morning? The trial of this case is adjourned until ten minutes before 10:00 tomorrow morning.

(Whereupon a recess was had herein to 9:50 a.m., May 18, 1945.) [339]

Seattle, Washington

May 18, 1946; 9:50 a.m.

The Court: You may proceed.

Mr. Dobrin: It will not be necessary for Mr. Hay to take the stand as I have no cross examination of him.

Mr. Gose: The defendant rests, your Honor.

Mr. Dobrin: Mr. Foisie, please take the stand.

F. P. FOISIE

having been previously sworn, was recalled and testified in rebuttal on behalf of Plaintiff as follows:

Direct Examination

By Mr. Dobrin:

Q. Mr. Foisie, pursuant to the resolution which appears as Exhibit F, did you in response to that particular resolution proceed to Seattle and discuss the payment of non-payment of Association assessments with Griffiths and Sprague.

A. I did proceed to Seattle. I didn't have opportunity to discuss it with Griffiths and Sprague on that visit.

(Testimony of F. P. Foisie.)

Q. Did you pursuant to the resolution shown on Exhibit F come to Seattle and discuss the subject with the Army Transport Service authorities?

A. I did, with Colonel Weed.

Q. Do you know approximately when that was?

A. Shortly after the previous visit referred to in the previous exhibit.

Q. That is this Exhibit F? A. Yes.

Q. Sometime shortly after January 12? [340]

A. Yes.

Q. In 1943? A. Yes.

The Court: How long is your examination going to take?

Mr. Dobrin: I wouldn't think it would take 15 minutes.

The Court: I think I will interrupt at this time.

(Recess.)

Q. What was your purpose in seeing Colonel Weed?

A. To advise him fully in the circumstances of our difficulty with our member company doing their work, the Army's work.

Q. At the meeting with Colonel Weed what did you advise him?

A. I told him of the circumstances surrounding the refusal of this member to pay the assessment rate that all other contractors for the Army from the Columbia River south were paying and indicated they would continue to pay.

Q. Did you request Colonel Weed to take any action in respect to Griffiths and Sprague?

(Testimony of F. P. Foisie.)

A. On the contrary—no, perhaps I should say.

Q. Did you advise him in any respect as to the position of the Association in event of continued difficulty with Griffiths and Sprague?

A. Yes.

Q. And what did you advise him concerning that?

A. I told him that no matter what our difficulties with our member companies were or would prove to be, under no circumstances would the Association impede in the slightest degree the war effort, that we would have to [341] have our recourse against the member company in some other way than in any sense impeding the operations.

Q. Will you glance over Exhibit L and familiarize yourself with it?

A. Yes, sir. (Witness does so.)

Q. Pursuant to the resolution shown on Exhibit L, was the study therein referred to made and a report made back to the Board of the plaintiff?

A. No.

Mr. Gose: What was the answer?

The Witness: No.

Mr. Dobrin: That is all. You may inquire.

Mr. Gose: No questions.

(Witness excused.)

Mr. Dobrin: Mr. Middleton, please take the stand.

K. J. MIDDLETON

having been previously sworn; was recalled and testified in rebuttal on behalf of Plaintiff as follows:

Direct Examination

By Mr. Dobrin:

Q. Mr. Middleton, I show you Exhibit N, being a letter of December 11, 1942, written by you to R. C. Clapp, F. E. Settersten and H. A. Armstrong appointing them as a committee, and I wish to ask you this question, did that committee work out a plan and submit the same to the Waterfront Employers of Washington pursuant to their appointment? [342] A. No.

Mr. Dobrin: You may inquire.

Mr. Gose: No questions.

(Witness excused.)

Mr. Dobrin: That is all.

Mr. Gose: Defendant rests too, your Honor.

Mr. Dobrin: That closes our case, your Honor.

The Court: Plaintiff rests and defendant rests.

Mr. Gose: Yes.

The Court: All right. How much time would you like for argument?

(Discussion off the record followed by argument by counsel.) [342]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11437

GRIFFITHS AND SPRAGUE STEVEDORING
CO. INC.,

Appellant,

vs.

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST, a Corporation,
Appellee.

ORDER ELIMINATING EXHIBITS FROM
PRINTED TRANSCRIPT OF RECORD

Good cause therefore appearing, It Is Ordered that the original exhibits in above cause need not be printed in the printed transcript of record herein, but will be considered by the Court in their original form.

WILLIAM DENMAN

United States Circuit Judge.

Dated: San Francisco, Calif., October 11, 1946.

[Endorsed]: Filed Oct. 11, 1946. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD ON
APPEAL

Appellant hereby adopts as its statement of points on which it intends to rely on appeal, its statement of points heretofore filed herein in the District Court, and appearing in the certified transcript of record.

Appellant likewise designates the entire certified transcript of record of proceedings in the District Court as the record for printing and consideration by the Court in this appeal:

/s/ McMICKEN, RUPP &
SCHWEPPE,

/s/ J. GORDON GOSE,

/s/ EDWARD M. HAY,

/s/ DAVID A. HAMLIN,

Attorneys for Appellant.

Copy received Oct. 9, 1946.

BOGLE, BOGLE & GATES

[Endorsed]: Filed Oct. 10, 1946. Paul P. O'Brien,
Clerk.

[Endorsed]: No. 11437. United States Circuit Court of Appeals for the Ninth Circuit. Griffiths and Sprague Stevedoring Company, Incorporated, a corporation, Appellant, vs. Waterfront Employers Association of the Pacific Coast, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed October 2, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

IN THE
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CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

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COMPANY, INCORPORATED, a corpora-
tion.

Appellant,

vs.

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST, a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

APPELLANT'S OPENING BRIEF

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JAN - 9 1947

PAUL P. O'BRIEN,

Attorneys for Appellant.

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IN THE
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Appellee.

No. 11437

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

The jurisdiction of the District Court is based on diversity of citizenship in a controversy involving more than Three Thousand Dollars (\$3,000.00). The complaint alleges that appellee is a non-profit corporation formed under the laws of California, that appellant is a corporation formed under the laws of the State of Washington, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00) (Tr. 2). These allegations are admitted by appellant's answer by failure to deny them (Tr. 6) in accordance with Rule 8 (d) of the Rules of Civil Procedure. The trial

court's Findings 1, 2 and 3 (Tr. 36, 37) are in accord with these allegations.

Thus, jurisdiction clearly exists under Title 28, Section 41, United States Code Annotated.

STATEMENT OF THE CASE

The appellee, plaintiff in the lower court, is a non-profit corporation formed under Sections 593-605e of the Civil Code of California. It was organized in June of 1937. As its name indicates, its membership consists of various commercial concerns which employ waterfront labor in the various ports of the Pacific Coast. Its purposes and functions comprehend the taking of action beneficial to its members, particularly in the field of water-front labor relations (Tr. 50 to 78).

The appellant, defendant in the lower court, is a Washington corporation engaged in the stevedoring business in Seattle, Washington. In that business it is necessarily an employer of longshoremen. It has been an associate member of the appellee ever since the latter was organized in 1937 (Findings 2 and 4, Tr. 36, 37).

This suit was brought by the appellee to recover judgment against appellant for dues alleged to be owing from appellant as such associate member for the calendar years 1943 and 1944. The dues claimed consist of a so-called tonnage tax, or tonnage assessment, in the amount of $2\frac{1}{2}$ c per ton on cargo loaded or discharged by appellant in its stevedoring operations during such years. All of the cargo involved in

the case was loaded or discharged by appellant in stevedoring operations for the account of the United States Army.

The District Court entered judgment against the appellant in the principal sum of \$74,471.04. This amount correctly represents all tonnage loaded or discharged for the United States Army in the two years multiplied by $2\frac{1}{2}c$. If appellant is liable at all, the amount stated in the judgment is correct. Appellant, however, denies liability for any part of this sum.

The facts of the case are complex as to detail and the manner of their presentation in the trial court adds considerably to this complexity. For the most part, however, the essential facts are contained in the record in documentary form. A rather detailed analysis of the facts will be given in connection with argument on each of the several points raised by the appellant. For the present the following brief statement will suffice.

The only form of dues sought to be charged by appellee is the tonnage assessment above mentioned. According to the appellee, this is a charge authorized by the statutes under which it is organized and by appellee's Articles of Incorporation and By-laws adopted pursuant to the statute. The appellee further asserts that this charge has been levied by its Board of Directors in the exercise of its powers. Specifically, the appellee asserts that this tonnage assessment, in the amount of $2\frac{1}{2}c$ per ton so far as this case is concerned, is payable by every member of appellee, vot-

ing or associate, for every ton of cargo which such member loads into or discharges from any vessel in any port of the Pacific Coast of the United States, except Alaska ports. Appellee concedes that the charge is tied strictly to the process of loading or discharging cargo and, consequently, that the handling of cargo otherwise than in the process of loading and discharging vessels does not subject any member to liability for payment of dues of any kind (Tr. 362, 377, 378). Finally, appellee asserts that it is right and proper for any member loading or discharging cargo to pass the 21½c assessment on to the operator of the vessel as a direct and distinct charge to the end that such operator, even though not a member of appellee, will provide the funds which support the appellee corporation. In fact, this procedure of passing on the ultimate burden of the assessment is definitely recommended in those instances where a member of appellee loads or discharges cargo for a vessel owned by or operated for the account of someone who is not a member of the appellee corporation (Tr. 101 to 103).

In addition to the foregoing, appellee asserts that appellant has agreed to pay the "tonnage assessment."

In the face of these contentions, appellant denies all liability in this case and asserts the following propositions which constitute the legal issues on this appeal:

1. That appellee's "tonnage assessment" program and any agreement with respect thereto are contrary to public policy and void as applied to cargo loaded and discharged for the account of the United States Army, that being the only type of cargo involved in this case.

2. That appellee's "tonnage assessment program" and any agreement with respect thereto are void because the statute under which appellee is organized requires that any dues charged by appellee be uniform as to its members or classes of members and such uniformity does not exist.
3. That appellee, under its Articles of Incorporation and By-laws, is without power to levy or collect dues from any associate member such as appellant.
4. That all attempted exercises by appellee's Board of Directors of the asserted power to levy dues are invalid because no vote of the appellee's membership fixing of a maximum rate for such dues has been had as required by the By-laws.
5. That in fact the appellee's Board of Directors have never adopted any resolution levying the tonnage assessment against any associate member, including the appellant.
6. That appellee's "tonnage assessment" program and any asserted agreement of appellee to comply therewith are void because appellee has threatened to enforce the same by economic duress.
7. That appellant has never, in fact, agreed to pay the "tonnage assessment."

For the most part appellant has no quarrel with the trial court's affirmative findings of fact. Consistent with the contentions above listed, it does deny the correctness of Finding 7 (Tr. 38) which states that the tonnage assessment has been levied and assessed against appellant pursuant to the by-laws; Finding 9 (Tr. 38) which implies that a certain Agreement of May 9, 1940, is applicable to all non-member cargo, including that handled for the account of the Army;

Finding 16 (Tr. 41) insofar as it indicates willingness of the United States Army to bear the assessment; and Finding 17 (Tr. 41) stating that the tonnage assessment is uniform. All of these findings are in effect legal or factual conclusions which stand or fall upon the evidence and the law of the case. The pertinent evidence in each of these instances is documentary in character. There is, despite the mass of evidence, no real dispute as to the facts of the case, but rather only as to the factual and legal conclusions to be drawn therefrom. The pertinent facts in more detailed form will be stated in connection with the argument upon each of the points listed above.

SPECIFICATION OF ERRORS

The trial court erred in the following particulars:

1. In failing to conclude as a matter of law that appellee's claim is contrary to public policy and therefore void and unenforceable.

2. In finding that appellee's claim is a uniform assessment falling equally and alike on all members of the appellee who load and discharge cargo (Finding 17, Tr. 41).

3. In failing to find as a fact that appellee's claim is not uniform as to the various members or classes of members of the appellee.

4. In failing to make a conclusion of law that such lack of uniformity renders appellee's claim unenforceable.

5. In failing to make a conclusion of law that appellee is without power to levy and collect dues from an associate member such as appellant.

6. In finding that appellee levied the tonnage assessment pursuant to its By-laws and in failing to find that no dues have ever been levied by appellee pursuant to such By-laws (Finding 7, Tr. 38).

7. In failing to find that no resolution levying dues has ever been adopted applicable to an associate member such as appellant (Finding 7, Tr. 38).

8. In failing to find that appellant at no time contracted to pay the tonnage tax on Army cargo.

9. In failing to find that appellee's claim is unenforceable because based on duress consisting of threats of economic reprisals against appellant.

10. In failing to conclude from all evidence in the case that judgment should be entered in favor of appellant and in failing to enter judgment in appellant's favor.

ARGUMENT

Appellee's Claim Is Contrary to Public Policy and Therefore Void. (Specifications of Error 1 and 10)

The foregoing proposition disposes of every issue in this case. It is manifest that if appellee's claim contravenes public policy to such an extent that it is legally void, no agreement of the parties can give it validity nor can the fact that appellee possesses a general power to collect dues from its members sustain

a specific dues program which so conflicts with public policy.

What then are the public policy aspects of this case? Simply that the avowed program here is to require the appellant to pay dues measured by the volume of services rendered by it to a branch of the United States government, to-wit, the United States Army with the added recommendation that the amount of these dues be included in the contract with the Army, either directly or indirectly, whichever may be the more feasible. The appellant maintains that this program by which appellee inevitably seeks to finance its operations by adding to the costs of public contracts made by its members is so absolutely contrary to public policy as recognized by the courts as to be wholly illegal and void.

Ordinarily, one would expect that any non-profit organization would finance its operations by some method which would call on all of its members to contribute to its support on some uniform basis. It is well known that such organizations frequently have different classes of members and that, where there are such different classes, they generally possess different rights within the organization and frequently have different financial obligations to it.

The appellee corporation has two classes of members designated respectively as voting and associate members. There are now 84 voting members and 47 associate members. Formerly the membership was greater (516). As the names imply, voting members possess the entire voting power which, of course, includes the

power to elect the appellee's Board of Directors, which in turn determines the policies of the appellee corporation and has the management of its affairs. Steamship operators and their agents are eligible for voting membership. Other employers of waterfront labor, primarily stevedoring companies and terminal operators, are eligible for associate membership. The appellant is in the latter category (Appellee's Articles and By-Laws, Tr. 50 to 78).

The Articles and the By-laws of the appellee are not entirely clear as to the relative financial obligations of the two classes of members. One of appellant's points on this appeal is that, under a proper construction of these documents, associate members are wholly exempt from liability for dues. That precise question is, however, of no moment so far as the problem of public policy is concerned. That problem rests rather on what has actually been done by appellee under the guise of levying dues. What appellee might legally and properly have done is another question.

The appellee's dues program, as expounded by appellee, comes down simply to the position that the cargo should bear the cost (Tr. 363), that only such members of appellee as actually place cargo aboard ship or remove it from the ship would pay the 2½ cents per ton (Tr. 377, 378) and that such paying members should obtain the money from the carrier by adding the charge to the amount of their contracts with the carrier (Tr. 101 to 103). The end result of this program is twofold. First, the charge is to be passed on to the carrier even though the latter, as in the case of the United States Army, is not a member of the appellee

corporation in any sense. Second, a member may, to the extent that his business operations do not involve the precise task of loading or unloading vessels, enjoy all of the benefits of membership without any financial responsibility to the appellee (Tr. 378). Some members never or substantially never engage in loading or unloading operations (Tr. 425). Terminal operators, for example, employ longshoremen under labor contracts negotiated by the appellee corporation, but since these men are used for dock work, that is, moving cargo on the dock, as distinct from placing it aboard or removing it from a vessel, the terminal operator is not called upon to support the appellee's operations (Tr. 378, 425, 435 to 437, 475). It is thus apparent that the whole dues program is focused upon the single phase of loading and discharging cargo to the end that the actual burden of financing the appellee will be placed upon the carrier, member or non-member as the case may be, and that the member which conducts the loading operations is in ultimate practical effect designed to be a sort of collecting agent for the appellee. It is, to quote appellee's president, a "form of direct taxation" (Tr. 363).

It is perhaps superfluous to document this account, because we anticipate that the appellee which so frankly espoused these positions at the trial will not contradict them here. However, for the court's convenience, the following references to the record will bear out what has been said.

A considerable number of resolutions have been adopted by appellee's Board of Directors relative to the

tonnage assessment here involved. The pertinent ones are in the record. We summarize them briefly.

The first is a resolution adopted July 31, 1937, shortly after appellee's organization (Plaintiff's Exhibit 3-A, Tr. 95, 96). So far as here material it levies "one assessment" at the rate of 2 cents per ton on general cargo. It does not say who shall pay this amount. It does, however, make it clear that at this early date, the appellee entertained the idea that its dues collecting power extended to persons other than its own members, because provision was made for collection of another form of charge in the following language:

"Operators who are not members of either individual port association or the Coast Association: 2½c per man per hour." (Tr. 95)

We have here the origin of a delusion of grandeur that any person who elects to employ a longshoreman, even though he has no connection with appellee or with any local association which is an associate member of appellee (Tr. 55), must pay tribute to the appellee Coast Association (Tr. 304).

This resolution of July 31, 1937, was amended by further resolution on May 11, 1938 (Plaintiff's Exhibit 5, Tr. 96, 97). This increased the general cargo tonnage assessment to 2½ cents per manifest ton, stating that the levy is "on all cargo loaded and/or discharged at Ports on the Pacific Coast of the United States (except Alaska ports)." Again this resolution does not state precisely who is to be liable, but the notion of a charge *in rem* against the cargo is most evident.

The third resolution was adopted February 14, 1940 (Plaintiff's Exhibit 7, Tr. 99, 100). It recites that "confusion has arisen" concerning the tonnage assessment. Parenthetically, it may be said that an examination of all the records of appellee, as shown by the record in this case, demonstrates that confusion is the rule and not the exception, since at no time have appellee's Board of Directors ever adopted a resolution clearly stating its position on the subject of dues. However, this particular resolution continues the 2½ cents per ton rate on general cargo stating that this levy is made on "all tonnage loaded or discharged at all U. S. Pacific Coast Ports (except Alaska ports)."

At this point, the question of collecting from non-members received more direct attention. It is to be remembered that prior to the war much, if not most, of the cargo entering and leaving Pacific Coast ports was carried by steamship companies which were voting members of appellee. However, as foreshadowed by the resolution of July 31, 1937 (Tr. 95), appellee did not propose to let any non-member enter or leave any Pacific Coast port without paying for the privilege. Apparently, the man-hour charge specified in the July 31, 1937, resolution had not been wholly effective to meet this situation, because on February 15, 1940, we find appellee's Board of Directors adopting a recommendation made on the same day by its stevedoring committee.

In substance this February 15, 1940, resolution (Defendant's Exhibits D and E, Tr. 197 to 199) provided for the following things: All members of appellee, who

furnished stevedoring service, were to be provided with a list of appellee's voting members. This would enable them to identify non-member steamship companies. Before commencing work for any such non-member they should ascertain whether the non-member would agree to pay the tonnage tax and, if so, collect the proper amount from the non-member. If the non-member should refuse to pay the 21½ cents per ton "tonnage tax," the member doing the stevedoring should insert in his contract with the non-member a clause requiring the non-member to pay 4 cents per man-hour on the work done for him. The record, independent of this resolution, shows that the latter charge would be greater than the tonnage charge (Tr. 699). Finally, with the most brazen frankness, this resolution states that the man-hour charge to non-members is "predicated upon the understanding that Waterfront Employers of the Pacific Coast will proceed at once to reach an agreement with the District Officials of the I. L. & W. U., that where owners or operators of non-member vessels do not agree to promptly pay tonnage or man-hour assessments, no men will be furnished by the I. L. & W. U. or any of its Locals for stevedoring work on such vessels * * *" (Tr. 198, 199). The I. L. & W. U. is, of course, the Longshoremen's Union with which appellee makes labor agreements (Tr. 141).

This drastic action appears to have not been wholly effective, so that the matter of non-member liability was dealt with further on May 8 and May 9, 1940. On the former date, appellee's Board of Directors adopted as its official action any plan "for assessing and col-

lecting non-member tonnage" which might thereafter be worked out by a committee to be appointed, subject to the further requirement that the committee report be consented to in writing by "a majority of the member stevedores in the several ports" (Tr. 101, Plaintiff's Ex. 9). The Committee's action, so approved in advance, took the form of a written contract ultimately signed by a majority of the stevedores, including appellant.

This contract (Tr. 101 to 103) is most strongly relied upon by appellee both to sustain its claim against appellant and to establish its theories as to the general scope of its "tonnage tax" program. It is also made the subject of the trial court's Finding of Fact No. 9 (Tr. 38). It is a poorly drawn document but its essential terms are clear. It first provides that member stevedores "undertake to collect and remit the uniform coast tonnage tax on all cargo handled by them for non-member steamship companies." Then follows a provision that member stevedores will insert a clause in their contracts with non-members imposing similar liability on the non-members. The appellee then engages to keep the stevedore members advised as to the names of member steamship companies "for whom the stevedore accepts no responsibility for payment of tonnage tax," as to current tonnage assessment rates and as to methods of reporting tonnage and paying assessments. The appellee further undertakes to "consider relieving member stevedores from payment of tonnage assessments for non-member lines upon written state-

ment of the facts that they have tried but failed to collect under the foregoing contract provisions" (Tr. 102). Finally, we again find a concluding clause under which appellee seeks to sweep all the fish into its net by requiring non-member stevedores serving non-member steamship companies to pay the more expensive 4 cents per man-hour charge already referred to (Tr. 103).

Upon reading this agreement one would naturally assume that the non-member steamship "companies" referred to therein would not include operation of vessels by the United States government. The appellee, however, has long insisted and still insists that the government is caught by this contract just as effectively as the private non-member steamship operator. Appellant denies that the agreement can be so construed. The language is plain and it cannot be so warped in meaning so as to include the United States Army.

In fact, the matter of government cargo soon received specific attention. As this court will judicially recognize, this agreement of May 9, 1940, came on the very eve of the invasion of the Low Countries and France by the German Army. France capitulated in June of 1940 and from that time forward the government of the United States commenced what was first called the defense effort which changed to the war effort after December 7, 1941. Transportation of Army cargo became a matter of moment before Pearl Harbor and thereafter the government took over all shipping. Private steamship operators, including all the voting members of the appellee, thus ceased to carry on their regular business, although they did act thereafter for

the government as agents conducting its steamship operations (Tr. 500, 501) and received compensation for so doing (Tr. 505).

The practical importance of dealing with the subject of Army cargo is reflected by the next resolution adopted March 12, 1941 (Plaintiff's Ex. 14, Tr. 110, 111). That resolution states that it is the "recommendation" of the Board that member stevedores handling Army and Navy cargo "be required to collect the tonnage assessment and pay the Association assessments for such cargo handled in conformity with the agreement, authorized by the Board May 8, 1940 * * *."

Again, on April 16, 1942, a further resolution was passed dealing with Army and Navy cargo (Plaintiff's Ex. 15, Tr. 111). That resolution instructed appellee's treasurer to request members "to regularly report * * * all tonnage handled by them for the account of the Army and the Navy * * *," and directed the treasurer further to outline to members the manner of reporting such tonnage. This the treasurer did by letter of April 27, 1942 (Plaintiff's Ex. 16, Tr. 112). This letter is of interest in its entirety, but as applied to the present point especially so in stating that appellee understands that the tonnage assessment is actually being paid by the Army and Navy under contracts between them and the stevedores.

Finally, on June 25, 1942, appellee's Board, by resolution, again speaks on the subject (Plaintiff's Ex. 17, Tr. 115). It there authorizes the treasurer to advise those members performing stevedoring service for

the Army, Navy or War Shipping Administration that they are "obligated to report the tonnage so handled and pay the assessment to the Association in the same manner that non-member tonnage has been reported to the association," and that the rate is still 2½ cents per ton.

The foregoing series of resolutions demonstrates beyond all question that it is the recommendation, purpose and policy of the appellee to "tax" Army cargo directly for appellee's support. All of the later resolutions take the position that the stevedore should treat the Army like a "non-member steamship company," the duty in such case being that the stevedore should "collect and remit." The March 12, 1941, resolution positively states that stevedore members shall be "required to collect" from the Army, thus making it the real dues payer and financier of appellee. That such a method of financing the affairs of an employer's association is utterly contrary to public policy is established by the following decisions:

Kentucky Association of Highway Contractors v. J. C. Williams, 213 Ky. 167, 280 S.W. 937, 45 A.L.R. 544;

Constructors Association of Western Pennsylvania v. Seeds, 142 Pa. Super. 59, 15 Atl. (2d) 467;

Associated Wisconsin Contractors v. Lathers, 235 Wis. 14, 291 N.W. 770;

Master Builders Association of Kansas v. Carson, 132 Kan. 606, 296 Pac. 693;

Bailey v. Master Plumber Association, 103 Tenn. 99.

In each of these cases, the plaintiff was, like appellee here, an association of business concerns. In each instance, the suit was one to collect dues from a member and in every instance the dues were in the form of a percentage of the amount of the members' contracts with public agencies. In all of the cases the court held that the suits must fail because the claims were contrary to public policy.

In *Kentucky Association of Highway Contractors v. J. C. Williams*, *supra*, 213 Ky. 167, 280 S.W. 937, 45 A.L.R. 544, the membership of the plaintiff non-profit corporation consisted of highway contractors. Its articles of incorporation contained a statement of purposes fully as laudable as those set forth in the articles of Waterfront Employers Association of the Pacific Coast. Its by-laws provided for annual dues of \$50.00 a member and, in addition, "one-fourth of 1 per cent on all federal, state, and county highway work in the state of Kentucky, contracted for by members of this association, shall be paid into this association."

Defendant, a member of the plaintiff, procured three highway construction contracts at contract prices aggregating something over \$400,000.00. He paid a part of the one-fourth of one per cent charge called for by the by-law above quoted, but refused to pay remaining amounts aggregating about \$770.00. Suit was brought against him by the association to collect this amount, and the defense was illegality of the by-law. The plaintiff introduced evidence as to its praiseworthy purposes and maintained that these purposes plus the reasonableness of the amount of the dues, made the by-law valid. The court, however, held that

the by-law was invalid and denied plaintiff any recovery.

In arriving at this decision, the court analyzed the general authorities in some detail on the question of the propriety of provisions such as this which have a tendency to add to the cost of public contracts. The court then said:

“It will be seen that the prohibited contracts, upon the ground that they are against public policy, are those which have ‘a tendency to be injurious to the public or against the public good,’ and that their validity is determined by their general tendency *at the time* they are made, and, if such tendency is opposed to the interest of the public, the contract will be invalid, ‘even though the intent of the parties was good, and no injury to the public would result in the particular case. The test is the *evil tendency* of the contract and not its actual injury to the public in a particular instance.’ ”

And, further, the court stated:

“Human nature is a thing of which courts will take judicial knowledge, and a part of it is to protect oneself from expenses and financial burdens, as much so as possible, and to shift or avoid them whenever an opportunity exists. The contract here involved directly creates that opportunity; i.e., it creates a stimulus on the part of the member contractor to add to his bid on all public contracts the amount that the association’s contract with him forces him to pay to it, and to thereby recoup that amount for his own protection, from the public authority letting the contract. The contract sued on can have no other tendency, since it is a *direct* levy by plaintiff of a

tax on the contract price of its members made with the public and to be paid out of public funds, and the purpose which it tends to accomplish with that tax after it is collected has nothing whatever to do with the question.

“But it may be argued that it is lawful for contractors to organize themselves for legitimate purposes and to collect dues from the members of such organization for the purpose of maintaining and supporting it, and that, if the dues here involved are against public policy, then any that might be devised would likewise be so; but such is not true, since the collection of dues from a member, regardless of whether he obtains contracts, is in no sense a direct tax upon, or the levying of a tribute on, the price of his contracts. In the supposed case he pays his dues out of any money that he might possess, regardless of the fact as to whether he may ever become a successful bidder, and such a method has in no sense a *direct* tendency to injuriously affect the public good. At most, it could only remotely do so, thereby presenting a case not coming within the ‘public policy’ rule, and consequently a contract not forbidden by the law.”

The Court thus squarely held that a dues program of this character would have a tendency to influence the cost of public contracts to the injury of the public, and the mere existence of such a tendency at the time in question rendered the contractual features of the by-law wholly unenforceable.

In *Constructors Association of Western Pennsylvania v. Seeds*, *supra*, 142 Pa. Super. 59, 15 Atl. (2d) 467, the plaintiff association, whose membership likewise consisted of contractors, had a by-law like that

involved in the Kentucky case. This Pennsylvania by-law provided for a \$50.00 admission fee and a further amount of:

“* * * one-half of one per cent of the gross amount of each contract secured in the area covered by the Association. This percentage, one-half of one per cent, shall be included in any estimates for new work taken subsequent to the date of the incorporation of this Association, and within the limits of the boundaries of the authority of the Association.”

Subsequently, this percentage was reduced to one-fourth of one per cent. The defendant member of the Association was awarded a contract in the sum of over \$800,000.00 by the United States Government for the construction of a dam over the Ohio River in Pennsylvania. This action was brought by the Association to recover one-fourth of one per cent of the total contract price amounting to \$2,192.94. The defendant offered no evidence, but moved for a directed verdict on the ground that the by-law above quoted was invalid as contrary to the public policy of the Commonwealth of Pennsylvania and, therefore, unenforceable. This motion was granted by the trial court and affirmed on appeal. In affirming the lower court, the appellate court stated:

“The by-law under consideration constitutes the agreement between the association and its members and is subject to the same rules of construction as a written contract signed by all the parties. Like all by-laws it shall be deemed to be legal unless manifestly it tends to injure the public in some way. Its validity, however, does not depend upon the actual injury that may result to

the public. The test to be applied to determine its legality is whether its general tendency is opposed to public policy; if so, the contract is unenforceable notwithstanding the intention of the parties is good and no injury has actually resulted. *Kuhn v. Buhl*, 251 Pa. 348, 370, 96 A. 977, Ann. Cas. 1917D, 415."

The Court then referred to the Restatement of the Law of Contracts, Volume 2, Section 517, pointing out that under one of the examples given in this section of the Restatement, a contract of this kind is squarely contrary to public policy. The Court next referred to the Kentucky case above discussed and, after considering it in some detail, stated:

"* * * The by-law before us, as the one in the Kentucky case, has an undoubted tendency to cause members to add the percentage payable to the association to their bid and thus in effect tax all contracts public and private to the extent of the percentage added. We agree with the learned court below in its rejection of the appellant's argument that the percentage paid the association would be absorbed or included in the indirect expenses or profit in the bid. As it aptly said: 'No matter how the item may be designated, or where concealed, it is still an item of expense which the contractor must consider and which must be reflected in his bid'."

And, finally, after discussing *Master Builders Association of Kansas v. Carson* (Kan.) 296 Pac. 693, the court said (page 469):

"It is immaterial whether or not the by-law provides that the percentage payable to the association is added to and included in the bid, the

plain effect is the same in either case. See *Kentucky Association of Highway Contractors v. Williams, supra.*"

In *Associated Wisconsin Contractors v. Lathers, supra*, 235 Wis. 14, 291 N.W. 770. There the plaintiff, a Wisconsin non-stock corporation, brought suit to collect a membership assessment claimed to be due from the defendant member for the year 1938. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and the defendant appealed. The complaint alleged that the plaintiff was a Wisconsin non-stock corporation consisting of members of the highway construction industry and affiliated interests, the purpose of which is "to promote the business of the individual members, advance the mutual interests to cultivate relations and cooperative efforts." The complaint further alleged that on February 28, 1938, the defendant had signed a written application for membership in which he agreed to accept the by-laws and the rules of the association, especially those pertaining to dues; that the application was accepted and \$250.00 was paid as advance dues; that the resolution as to dues provides that each member shall pay as an assessment for 1938 "one-fourth of one per cent of the amount of each contract secured in that year, which amount was to be paid sixty days after the award of the contract." The plaintiff alleged that the net amount owing from defendant computed on the above basis was \$410.54 for which judgment was sought. The Supreme Court of Wisconsin held this complaint to be legally insufficient, that

the demurrer should have been sustained, and, accordingly, reversed the lower court. In arriving at this holding, it stated:

“* * * An agreement limited to having a common treasury into which a certain percentage of the revenue from public contracts is to be paid under condemnation of the rule protecting the freedom and integrity of competition in securing contracts for public work. *Morgan v. Gove*, 206 Cal. 627, 275 P. 415, 62 A.L.R. 219; 2 Restatement, Contracts, p. 1002, §517. Where the complaint shows an assessment on contractors engaged in public works determined by the volume of public business obtained by them, the inference is that the expenses will be allocated to the bids and will tend to increase the expenditure on the part of the public with relation to those contracts. If that inference is not repelled by allegations of fact showing that such is not the case, the complaint is then insufficient for failure to state a cause of action. *Kellogg v. Larkin*, 3 Pin. 123, 56 Am. Dec. 164. It is then treated as a claim based on a contract void as against public policy. * * *

* * * * *

“* * * The public policy which insists upon competition between bidders for public work and dictates that contracts shall be let to the lowest responsible bidder is violated when prospective bidders enter into an arrangement to exact from each other a percentage ‘of the amount of each contract secured’ during the ensuing year. So valued is this method under our public policy that the law casts out as illegal an arrangement to hamper competitive bidding when so limited and so described. If the mere tendency or purpose of a contract works against public policy, it is illegal,

even though no actual damage be shown. 12 Am. Juris., p. 664, §672; *Houlton v. Nichol*, 93 Wis. 393, 67 N.W. 715, 33 L.R.A. 166, 57 Am. St. Rep. 928; 2 Page, Contracts, 2d ed., p. 1164, §672. From the allegations of the complaint it appears that the respondent association levies an assessment on the price to be paid by the public on contracts let to the members of the association. As pointed out, this is not lawful. The purpose of the rule is to prevent contractors from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit. 6 R.C.L. 731, §136; *Kentucky Association of Highway Contractors v. Williams*, 213 Ky. 167, 280 S.W. 937, 45 A.L.R. 544; 13 C.J., p. 424, §360; 17 C.J.S., Contracts, page 563, §211, page 580, §215; 5 Williston, Contracts, Revised ed., p. 4691, §1663; 2 Page, Contracts, 2d ed., p. 1545, §875, and supplement."

The court's discussion in this case was so clear as to require little comment. It is, however, interesting to note that this case decided by the Wisconsin Supreme Court preceded by a few months the decision of the Pennsylvania Court in the other case. Apparently the two cases arose so nearly at the same time that neither court had the benefit of the reasoning of the other court. However, both follow the doctrine of the Kentucky case and both significantly rely upon the Restatement. Neither entertain any doubt whatsoever as to the illegality of this type of dues sought to be imposed by the commercial associations.

In *Master Builders' Association of Kansas v. Carson*, *supra*, 132 Kan. 606, 296 Pac. 693, the by-law re-

quirement of the plaintiff association was that each member pay one-half of one percent of the full contract price on all work done by such member. That by-law was found to be invalid on the same principles as those mentioned in the other cases, that is, because of its evil tendency to cause increased cost of public contracts. In discussing the factual problem, the court said:

“ * * * What is the tendency of the contract in question? Knowing human nature as we do, this court is bound to assume that the contractor bidding on a job, knowing that he will be called upon to pay one-half of 1 per cent. of the contract price to a stranger to the contract, will add that amount to the amount of his bid. This, of course, would increase the cost of the school building that much. This must be paid by the consumer.”

It is clear from the foregoing cases that all that the law requires as a basis for complete condemnation of such methods of financing by employer associations is that they show a *tendency* to add to the cost of public contracts. The rule does not require proof that such a tendency actually was carried into execution or encouraged by the association. In the case involved upon this appeal, however, it is frankly conceded that the member should make every effort to pass the charge directly on to the public. In fact, the first resolution relative to Army cargo “required” the stevedoring companies to collect the assessment from the Army, and the later resolutions are of the same general tenor. In such circumstances the dictates of public policy against the validity of the claim become overwhelming.

In the court below, the appellee relied upon one case which it asserted laid down a different and sounder rule. That case is *Electrical Contractors' Association of the City of Chicago v. A. S. Shulman Electric Company*, 391 Ill. 333, 63 N. E. (2d) 392. The trial judge in his oral remarks at the time of his decision also relied on this case (Tr. 34).

While the Illinois case does not agree without reservation with the holdings of the other courts above mentioned, the case there presented is so clearly distinguishable from the case now before the court as to render the decision worthless as authority. In the first place the Illinois decision apparently did not involve a situation in which the members of the employer association were paying as dues a percentage of public contracts. Members were required to pay 4/10 of 1% of all construction or merchandising business. The argument was not that the cost of any public contract was increased, but rather a somewhat obscure argument was made that competition was being stifled. The court was not able to see how that result might follow. In contrast, the present case leaves no room for doubt as to the direct evil consequences which attend passing on the tonnage tax to the government as appellee encourages its members to do.

Further, the Illinois court indicates that its position would be entirely different if the proof showed that the dues were in fact added to the contract prices of the members. Thus the court states that "It is our view that unless there is proof that such percentage was added to the contract price, there is nothing that

condemns it * * *." And again, "As previously noted, we do not agree that any inference that the public is going to be injured arises from the mere fact that the money collected from each member was computed on the percentage of business done." Certainly the Illinois court means to indicate that when the question passes from the field of inference into that of proof, as in the case at bar, the proof of a purpose to impose the burden on the government will nullify the claim.

Thus, so far as this case is concerned, the Illinois court announces no rule helpful to appellee. To the extent that it does differ in philosophy from the views of the courts of Kentucky, Pennsylvania, Wisconsin, Kansas and Tennessee, it is a minority rule but even the philosophical differences disappear in the face of the facts presented in the case at bar.

In the court below, appellee sought to make much of the point that the government should be glad to support it because appellee's activities were beneficial to the government (Tr. 484, 485). If that theory has any validity, it is apparent that every employer organization, every union and every conceivable person who in his own primary interest did something incidentally beneficial to the government should be entitled to be supported by it. The fact is that in San Francisco, the Army directly employed a very substantial number of longshoremen and appellee solicited the tonnage tax on account of cargo so handled directly from the Army. The Army refused to make any such payment (Tr. 484).

It was also asserted by appellee in the lower court and found by the Court (Finding 16, Tr. 41) that the Army has allowed the tonnage tax as an item of overhead expense. No Army or government official so testified nor is such a fact properly inferable from any documentary evidence in the record. If true, it would only demonstrate the more clearly how violative of public policy the whole method of appellee is. Certainly, no public official can bind the government to such a charge, when the law wholly condemns it as a matter of public policy.

But, appellee says, the Court finds (Findings 11 and 14, Tr. 39, 40), that appellant has paid the tonnage tax on account of War Shipping Administration cargo and some Army cargo. None of that cargo is involved in this suit and the statement of these facts utterly begs the question. The fact that one has performed other illegal contracts does not require or permit a court to abandon its principles by enforcing other different illegal transactions between the parties.

In short, the rules of public policy cut squarely across every phase of this case. All by-laws, agreements and practices of the parties are of no moment if the claim which is sought to be here enforced runs counter to the paramount public interest. That it does so is most clearly established by the cases above cited.

In concluding argument upon this point, we add that the vice of appellee's dues program actually runs far beyond the mere addition to the cost of public contracts. It is, when everything is considered, a much

wider and more evil thing. It is, as the corporate resolutions disclose, a plan to lay a toll upon every ton of cargo entering or leaving any Pacific Coast port backed by a threat of boycott in the handling of goods through the medium of a combination with the Longshoremen's Union as stated in the resolution of February 15, 1940 (Defendant's Exhibits *D* and *E*, Tr. 197 to 199). Though the evidence does not show that the Union ever concurred in this plan nor that the plan was ever applied, the fact remains that appellee's design is to fill its coffers by means of what it aptly calls a "tonnage tax," payable by every shipper, member, non-member or governmental agency as a condition to using the ports of the West Coast of the United States. By what right does the appellee arrogate such power to itself? The answer manifestly is by no right whatsoever and the practice should be condemned in its entirety.

The Tonnage Tax Is Invalid for Want of Uniformity Required by Statute. (Specifications of Error 2, 3, 4 and 10)

Assuming that, under appellee's Articles and By-laws, there is a power to charge dues against an associate member, such as appellant, the appellant maintains that such dues must, under the statutes of California, be uniform either as to all members of appellee or, in the alternative, must be uniform as to each separate class of members. The appellant asserts that such uniformity does not exist in the present case and that the tonnage tax is therefore invalid and unenforceable.

As previously noticed, the tonnage tax is directed solely to the process of loading and unloading cargo. Any member can employ longshoremen to an unlimited extent without liability for the tax so long as the work done by such longshoremen does not consist of placing cargo aboard vessels or removing it therefrom (Tr. 377, 378). Such a member obviously enjoys at no cost the benefits of the labor contracts negotiated by appellee (Plaintiff's Ex. 34, Tr. 141) and the various other services provided by appellee. Generally speaking, the activities exempt from the tonnage tax are called dock work, that is, the moving of cargo from place to place on docks and in warehouses as distinct from loading and unloading of vessels (Tr. 435 to 437, 475).

The volume of such work is very substantial and the non-uniform effect of exempting such work from the tonnage tax is strikingly illustrated by appellee's Exhibits 41 and 42 (Tr. 181 to 183). Thus, in 1943, in the Puget Sound District, the total man hours of longshoremen for the loading and unloading of vessels were 3,199,313, and for dock work were 2,290,700. In percentage these figures give approximately 58% to loading and unloading and 42% to dock work. In the same year and district, appellant's man hours for loading and unloading were 1,349,369 and for dock work 345,841. In terms of percentage this amounts to approximately 79% ship work and 21% dock work. It is thus at once apparent that appellant by being predominantly engaged in ship work is called upon to pay a far greater tonnage tax than are those members who are engaged predominantly in dock

work. In fact, the record shows that some members, chiefly terminal operators, in the Puget Sound area, substantially never do ship work and thus are not liable for the tax although they are associate members of appellee enjoying its privileges and benefits.

The figures for 1944 (Tr. 182, 183) are similar. In that year total man hours for ship work in the Puget Sound District were 3,554,026 and for dock work 3,097,928. In percentages these come to approximately 53% ship work and 47% dock work. The figures for appellant in the same year are 1,531,128 man hours of ship work and 479,875 man hours of dock work. In percentages these figures give approximately 76% ship work and 24% dock work. Again the burden on appellant is entirely disproportionate to that borne by the membership as a whole.

The statutes under which appellee was organized are Sections 593 to 605e of the Civil Code of California. Section 595, subsection 5, expressly authorized the creation of different classes of membership. It will be recalled that the appellee does have two distinct classes, voting members and associate members, (Plaintiff's Ex. 1, Tr. 50 *et seq.*) and that appellant is an associate member.

Section 598, subsection 10, of the statute authorizes the adoption of by-laws concerning dues, stating that such by-laws may contain provisions for:

“The fees of admission, transfer fees, dues and assessments to be paid by members of different classes of members and the methods of collection thereof. *Such dues or assessments or both*

may be authorized to be levied upon all classes of membership alike, or in different amounts or proportions or upon a different basis upon different classes of membership and memberships of one or more classes may be made exempt from either dues or assessments or both." (Italics ours)

The plain import of this statute is that uniformity of dues is required except that where different classes of membership exist uniformity based on class distinctions is sufficient. Here, however, there is neither uniformity of dues treatment as to the membership as a whole or by classes. The classes are steamship company voting members and stevedore and terminal operator associate members without voting rights. The by-laws do not classify the membership by separating those who load and discharge cargo from those who do not but the dues program unwarrantedly invents such classifications. The appellee's dues system is thus tied to an arbitrary standard, utterly foreign to the by-laws, which results in the instant case in having appellant, an associate member, called upon to bear a burden entirely out of proportion to that borne by other members either voting or associate. Such a result is neither within the letter or spirit of the statute.

While to the best of our knowledge there are no decided cases directly dealing with this aspect of the statute, the California District Court of Appeals has squarely recognized that uniformity of burden among members of a non-profit association is essential to any valid dues program.

The court announced this rule in *Alfalfa Growers of California v. Icardo*, 82 Cal. App. 641, 256 Pac. 287.

The plaintiff there was a non-profit association formed under a California Act different from that here involved. The court held that no reliance could be placed on that statute, because it contained nothing concerning power to levy dues, but plaintiff asserted that, independent of statute, the by-laws constituted a contract between it and its members and thus sustained the assessment. The court found that, owing to the wide variation in the scope of the operations of the member alfalfa growers, the assessment would necessarily bear upon the members unequally since it was not graduated to the scope or volume of their operations. In consequence, the court said:

“It is of the very essence of the law of assessments of the capital stock of corporations that the exactions shall be equal and uniform (6 Cal. Jur. 957), and the rule must of necessity apply to corporations which have no capital stock, even when the power is claimed to exist by contract. We determine that such a corporation cannot enforce by action alleged contract for assessments, where the exactions will result in unjust discrimination between its members.”

The appellee in the court below argued that the tonnage tax is uniform because it applies on the same basis to all members who load or unload cargo. There would be some merit to this position if such members were a separate class provided for by the Articles and By-laws. Here, however, no such classification exists so that any associate member who loads and discharges cargo is called upon to support the corporation although his rights in it are no greater than those of his fellow associate members who escape the bur-

den and are less than the rights of the voting members, who have, to a considerable extent, ceased to be active in the business of operating steamships since the government took over during the war.

The dearth of authority upon the point is no doubt accounted for by the fact that non-profit associations normally finance their operations by some form of charge which bears equitably upon all members of the group or all members of each of the various classes. It would certainly be novel for any social club to set up different classes of membership and then to disregard such classifications in levying dues, but instead to collect from those using one aspect of the club's services only and thus permit other members to enjoy all the remaining privileges of the club without being charged. Thus, for example, if a social club were to finance all of its operations by charging dues to only such members as actually make use of its library, leaving other members to enjoy and use all other facilities without charge, we would have a parallel situation. Obviously, such a remarkable practice would seldom if ever be employed so as to call for submission to a court of law, and it is therefore not surprising that there is no volume of authority on the subject.

However, no array of authority is needed to demonstrate that the statute requires that any distinctions between members as to dues liability must be a distinction based on membership classifications set up in the by-laws. From this it follows, as the California court held, that except as such distinctions are authorized by statute, the liability of the members of a non-

profit association or corporation for dues must be uniform as between them. The adoption of some measuring stick for dues liability which can and does apply upon a wholly unequal basis as between members, and which wholly ignores the membership classes set up by the by-laws, cannot support a valid claim by appellee.

As we shall show in discussing the next point covered by this brief, the "loading and discharging" rule as a measure of dues possessed the necessary uniformity when applied to voting members only as to all cargo carried by them on their ships, but when applied to associate members the lack of uniformity is apparent.

Appellee's Associate Members are Not Subject to Liability for Dues Under Appellee's Articles and By-Laws. (Specifications of Error 5 and 10)

One would naturally suppose that any set of Articles and By-laws of a non-profit association would clearly and simply define the dues paying obligations of its members. The appellee's Articles and By-laws, however, contrive to leave this simple question in a maze of obscurity. The resulting confusion is continued by the acts of the appellee's Board of Directors and officers over a period of years. Consequently, an analysis of the problem involves some considerable historical review of the appellee's affairs.

The Articles set up the two classes of membership, voting and associate, give the standards of eligibility for each class and repose entire voting power in the

voting members (Tr. 55, 56). The Articles say nothing about liability for dues.

The By-laws in Article XII, Section 5 (Tr. 66 to 68), distribute the voting power among voting members in proportion to the number of tons of cargo "loaded and/or discharged by or for such member during the preceding calendar year * * *." A somewhat parallel provision is contained in Article XVI, (Tr. 72) which states:

"In fixing all dues and levying all assessments, the Board of Directors shall determine the amount to be paid by each member per ton of cargo loaded and/or discharged at each United States Pacific Coast port (except Alaska ports)
* * *."

This provision uses the word "member" generally without the prefix "voting" or "associate" and to this extent suggests that both classes may be liable for dues. Likewise this provision omits the phrase "by or for such member" following the words "loaded and/or discharged," but that phrase or its equivalent must be interpolated to give any meaning at all to the By-law.

If there were nothing more than the foregoing, it might well be assumed that the purpose of the by-laws is to charge the tonnage tax against the member, voting or associate, who actually conducts the loading or unloading operation. However, the other provisions of the by-laws and the practices followed cast a very different light on the situation.

Thus Article XXI (Tr. 77, 78) squarely provides for distribution of assets on dissolution to voting

members only. It would be most unusual to require an associate member to pay moneys into the association in substantial amounts (in this case approximately \$75,000 for a two-year period) have absolutely nothing to say in the management of the corporation and have no rights in the proceeds on dissolution. It is true that the associate members could agree to terms so unfavorable to themselves but unless that is the clear consequence of the By-laws it cannot be inferred therefrom.

Article XV of the By-laws (Tr. 71, 72) is also of some interest. After providing for initiation fees from future voting members substantially in proportion to the voting power of each, it is provided that associate members shall not be required to pay any initiation fee "unless otherwise ordered by the Board of Directors."

What practical construction was given to these by-law provisions? None of any significance appears in the documentary evidence from the time when the corporation was organized in June of 1937 until the events of February and May of 1940 when it was sought to provide for collection of the tonnage tax as to cargo carried by non-member vessels. Prior to that time the corporate resolutions simply assess the tonnage tax generally without stating what class of member is liable (Tr. 95 to 97). In the proceedings of February 15, 1940 (Tr. 197 to 199) and May 8 and 9, 1940 (Tr. 100 to 103) elaborate procedures, involving agreement of stevedore associate members, were evolved to require the associate members to "col-

lect" the tonnage tax from non-member steamship companies and to remit amounts so collected to appellee. Now, obviously, if under the by-laws the stevedore associate members were or could be made liable as to all transactions in which they conduct loading and unloading operations, no such elaborate measures were necessary. Why were such elaborate measures taken?

The answer lies in one simple fact. By the understanding of everyone prior to the war the tax was one on the cargo to be paid by the carrier. This proposition is iterated and reiterated in the record and the entire philosophy of appellee's case (Tr. 362). This carrier responsibility so far as members of appellee was concerned rested on the voting members, who were engaged in the steamship business, not upon the associate members, who are not carriers. It was in obvious recognition of this general exemption of associate members that the appellee, when the subject of liability with respect to Army cargo arose, sought to rest its claim against the stevedore associate members upon the special "collect and remit" agreement of May 9, 1940, relative to non-member cargoes.

Out of the mass of documents in evidence and dealing with the corporate activities from the date of organization onward there is not a single clear statement that any dues are levied against an associate member pursuant to the by-laws and independent of the special agreement of May 9, 1940. That that agreement, relating to non-member steamship *companies*, does not apply to the United States Army is too clear to admit argument. It was, however, the

straw that the appellee sought to snatch thereafter to save itself from the recognized fact that the By-laws did not permit the direct assessment of an associate member (See Plaintiff's Exhibits 14 and 17, Tr. 110, 111, 115).

More explicitly the very agreement of May 9, 1940, (Tr. 105 to 107) states that appellee will advise the stevedore members of the list of member steamship companies, that is voting members, "for whom the stevedore accepts no responsibility for payment of the tonnage tax." It is difficult to see how any description could make the situation clearer than this agreement. As to cargo carried by member steamship companies, these companies were to pay the tax measured by the same tonnage which fixed their voting power, (Article XII, Section 5 of the by-laws, Tr. 66 to 68) even though such tonnage is loaded or discharged by an associate member stevedore. As to cargo carried by non-members of appellee, the associate member stevedore is liable only by special contract to collect and remit and then only when the non-member is a "company" and not when it is a governmental agency.

This practical interpretation of the By-Laws gives the only sensible solution to the problem, that is, that voting power and dues liability went hand in hand so far as the members were concerned. It was only when the voting members sought to expand their search for funds to their non-member competitors that the associate members were brought into the picture. As the voting members, with the advent of the war, ceased acting as carriers because their ships were taken over by the government, they sought to eat their cake and

have it by passing the financial burden on to the associate members while nevertheless retaining the whole voting power and right to divide the assets on dissolution.

It is true that at the trial Mr. Foisie, the appellee's president, stated that in the early history of the corporation associate members sometimes paid the tonnage tax on account of cargo handled for voting members. His admission that these instances were few in number and governed by special contract between the particular voting and associate members involved in such cases makes this testimony valueless on the fundamental question of liability (Tr. 379, 380, 431). The letter of this witness, in evidence as Defendant's Exhibit A (Tr. 186), clearly shows that prior to the war the financial burdens of appellee were the responsibility of the voting members.

It is axiomatic that the practical interpretation of the parties will govern the meaning of doubtful contractual provisions. Certainly the contract contained in the By-Laws, between appellee and its associate members, is, at best, ambiguous on the question of the latter's liability and the subsequent history of the company demonstrates that the true meaning of the By-Laws is that no associate member is liable for dues.

It is recognized by the authorities that the by-laws of a non-profit corporation or association govern the rights and liabilities of its members and cannot be expanded to include matters not within their reasonable import.

Fletcher on Corporations, Permanent Edition, Sec. 6597;

Jackson v. Minnetonka Country Club, 166 Minn. 323, 207 N.W. 632;

Duluth Club v. McDonald, 74 Minn. 254, 76 N.W. 1128;

Thompson v. Wyandanch Club, 127 N.Y.S. 195;

Pendennis Club v. United States (U.S.W.D. Ky.) 20 F. Supp. 758.

The Resolutions of Appellee's Board of Directors Purporting to Levy the Tonnage Tax are Invalid Because Not Authorized by Vote of the Membership. (Specifications of Error 6 and 10)

Article 4, subsection f of the By-Laws (Tr. 59), grants authority to the appellee's Board of Directors to levy dues in the following language:

"To levy, affix and collect, and provide for the collection of, dues or assessments in accordance with the provisions of these by-laws; but the Board of Directors shall not have the power to levy, assess or collect dues or assessments in excess of a maximum rate to be fixed, at a regular or special meeting, by vote of the members holding a majority of the voting power of the entire membership;"

Appellant maintains that the latter portion of this resolution requires, as a condition precedent to the levy of dues by the appellee's Board of Directors, that the voting members of the appellee, at a regular or

special meeting, fix maximum rate of assessment. No such action was ever taken by the voting members at any such meeting (Tr. 548 to 550) and, consequently, the appellee's Board of Directors have, in adopting all resolutions pertaining to the subject of dues, acted without authority. The clause in question specifically provides that the Board of Directors "shall not have the power" to levy any dues in excess of the maximum rate "to be fixed" by the voting members. Clearly that anticipated the fixing of such a rate before the Board of Directors could take any action.

Appellee's Board of Directors Have Never, in Fact, Adopted Any Resolution Levying the Tonnage Assessment Against Any Associate Member Including the Appellant. (Specifications of Error 7 and 10)

In discussing the proposition that the appellee, under its Articles of Incorporation and By-Laws, is without power to levy or collect dues from any associate member, we reviewed the various resolutions adopted by appellee's Board of Directors from the time when the appellee corporation was formed in June of 1937 down to the resolution of June 25, 1942. In all there were eight resolutions, being respectively, that of July 31, 1937 (Tr. 95, 96); that of May 11, 1938 (Tr. 96, 97); that of February 14, 1940 (Tr. 99, 100); that of February 15, 1940 (Tr. 197 to 199); that of May 8, 1940, including the Form of Memorandum Agreement dated May 9, 1940 (Tr. 100 to 103); that of March 12, 1941 (Tr. 110, 111); that of April 16, 1942 (Tr. 111); and that of June 25, 1942 (Tr. 115).

The first two of these resolutions do not in any way state what class of member is to pay the tonnage tax. As we have already shown, however, it is clear from those resolutions that the tonnage tax there provided for was the tax against cargo and was primarily directed against the carrier member steamship companies. The same is true of the resolution of February 14, 1940. Commencing with the resolution of February 15, 1940, and continuing through the resolution of May 8, 1940, the appellee was concerned with the question of collecting on account of tonnage carried by non-member steamship companies and in those instances provided only for the collection of the tonnage tax by stevedores from non-members under a special arrangement agreed to by the stevedoring companies.

The following resolutions of March 12, 1941, April 16, 1942, and June 25, 1942, all refer back to the special arrangements of 1940 concerning the stevedores' responsibility to collect from non-member steamship companies. At no point in any of the resolutions is it directly or inferentially stated that the tonnage tax is levied upon the associate members independent of the special arrangement made by the agreement dated May 9, 1940, concerning non-member steamship companies. It is perfectly clear that no reasonable standard of interpretation can bring the cargo loaded for the account of the United States Army within the provisions relative to non-member steamship "companies."

The appellee's claim of the applicability of the reso-

lutions to associate members nevertheless rests entirely upon that untenable proposition.

It certainly must be true that any member of the appellee non-profit corporation cannot be held to any obligation to pay dues until such time as the Board of Directors has, by definite action, adopted a resolution imposing such an obligation upon it. Assuming that the Board has such a power with respect to associate members, which power, however, the appellant denies, the fact remains that until that power has been exercised by an appropriate resolution the appellant cannot be liable. The resolutions, taken collectively, do not approach the form of a direct levy on the appellant or any other associate member but seek to accomplish this result by referring back to the special contract of May 9, 1940, which can not possibly be applicable to Army cargo and, in any event, limits the responsibility of stevedoring companies to trying to collect and remit from non-member steamship companies.

The Appellee's Tonnage Assessment Program, As Applied to the Appellant, Is Invalid Because Based Upon Threatened Duress. (Specifications of Error 9 and 10)

To any person viewing this case for the first time the thought may occur that if the appellant is not satisfied with the appellee's methods it can avoid any obligation by resigning its membership in the appellee's corporation. There are, however, two immediate answers to this idea. The first, to which we shall refer again in conclusion, is that the appellant is not re-

quired to resign simply because the appellee adopts an improper system of financing its operations. Rather, the appellant is entitled to remain a member and to insist that the appellee's dues program and policies be set up and maintained in accordance with law.

The second answer pertinent to the proposition now under discussion is that the appellee has made it clear, through its corporate resolutions, on several occasions that it proposes to exact an even greater charge from non-members who refuse to pay the tonnage tax.

In the very first resolution, adopted on the subject of dues by appellee on July 31, 1937, the appellee's Board of Directors inserted the following clause:

“Operators who are not members of either individual port associations or the Coast Association; 2½ cents per man per hour.”

On February 15, 1940 (Tr. 197 to 199), the Board of Directors increased this man-hour assessment to non-members to four cents per man-hour and proposed combining with the Longshoremen's Union to withhold men from any non-member refusing to comply.

In the May 9, 1940 agreement (Tr. 101 to 103) the final clause read as follows:

“The district associations undertake to collect from non-member stevedores for their non-member steamship companies a man-hour charge of 4 cents in lieu of the membership tonnage, and remit to the Coast Association.”

The appellee further, on February 25, 1943, passed an extended resolution directed against appellant in

which, among other things, it adopted a policy which it apparently thought would control or influence the action of the Port Association, Waterfront Employers of Washington, of which appellant is also a member. It there provided:

“RESOLVED, that San Francisco employers having agents in Seattle advise them fully of these proceedings with instructions to such who are members of the Washington Board of Trustees to attend any meeting called to consider this matter and vote to support the action of the Coast Board.”

Taking these actions as a whole, it is apparent that any member who withdraws from the appellee will not place itself beyond the demands of the appellee. Rather, it will place itself in the unfavored position of a non-member without right but subject to the 4 cents per man-hour demand as a condition to procuring longshoremen from the hiring halls jointly conducted by appellee and the union (Tr. 324, 325, 351). The 4 cents per man-hour rate would amount to about 52 cents an hour for a longshore gang of thirteen men while the $2\frac{1}{2}$ cents tonnage tax, translated to a man-hour basis for the same gang, would amount to $37\frac{1}{2}$ cents (Tr. 598). Thus the threatened action, if effective, would be even more costly to appellant than the tonnage tax.

Further, as the resolution last quoted from shows, appellee definitely attempts, through domination of the employees of appellee's San Francisco members, to have the trustees of Waterfront Employers of Washington take coercive action against appellant as a mem-

ber of the Washington organization, if appellant refuses to accede to appellee's demands.

The threats of economic compulsion contained or inherent in these measures are so fundamentally contrary to public policy as to justify this court in rejecting any demand based upon them.

The Appellant Has Never Made Any Enforceable Agreement to Pay the Tonnage Tax. (Specifications of Error 8 and 10)

Any possible liability of appellant under any theory of contract is, of course, eliminated if the public policy arguments heretofore made are adopted. Independent of the public policy aspects of the case, however, there is no basis for holding appellant in contract.

The only possible basis for a theory of contractual liability are three. First, the contract contained in the By-laws of appellee. Second, the May 9, 1940, agreement concerning cargo carried by non-member steamship companies. Third, a certain document signed by appellant's secretary under date of March 11, 1943.

The first and second of these possibilities have already been disposed of in this brief. The third is equally without merit as a basis for liability.

A brief examination of the events surrounding the March 11, 1943, document suffice to show that it is not a contract in the legal sense. At that date appellant had not paid certain of the tonnage taxes which appellee claimed it owed on account of Army cargo.

Appellee sent a committee from San Francisco to Seattle to attempt to secure payment. This committee and appellant, on March 10, 1943, for some reason undisclosed, took the matter up in a meeting of the Washington Association rather than privately. After some discussion appellant's attorney stated, according to the minutes of that meeting (Tr. 129), that there was "a moral obligation to pay." On the following day, the attorney, as Secretary of the appellant, signed the letter in evidence as Plaintiff's Exhibit 25 (Tr. 132, 133). Before signing this letter, the attorney refused to consent to having his client give a note for the amount claimed to be due because "I did not want to change its relationship to the Association, its legal relationship" (Tr. 610).

This letter then was nothing more than a recognition of the expressed moral obligation. Especially as to further tonnage assessments—and nearly all those involved in the present case are those subsequently accruing—it is unthinkable that appellant's counsel would agree to put his client in a position where its liability for dues would rest on a special contract wholly independent of its rights under the By-Laws, while all other members of the appellee corporation would be chargeable under the By-Laws only. To so do would place appellant on an entirely different footing from other associate members and thereby impair the value of its membership.

Further, there is no showing of any consideration whatsoever for this agreement. It was simply the unilateral expression of a then existing intention which is in no way legally binding.

CONCLUSION

It is not possible within reasonable and required limitations of space to explore every detail of the record in this case and we believe it quite unnecessary to do so. The essential facts have been covered and, in the light of applicable law, they demonstrate absence of liability upon the separate independent grounds already urged.

In concluding, however, we believe the court should be mindful of a few general propositions in this case.

The first of these is that the appellant has had no effective part in adopting or maintaining the dues program which it now challenges. As an associate member without voting power, it has been required to cope with the policies formulated and handed down by directors and officers designated by the voting members. Appellant's objections to these policies and supporting measures have, up to this stage, been ineffective, and it seeks the aid of this court to accomplish a result which it believes to be right and proper but which independently it is powerless to attain.

Second, the trial court has found, and it is a fact, that appellant has paid some tonnage taxes in the past on governmental cargo. Such past submission to illegal exactions certainly affords no basis for subsequent liability particularly when aspects of public policy are considered. Under such circumstances, appellant is to be commended rather than condemned for discontinuing payment.

Third, the trial court has found, and it is a fact,

that appellant has participated in benefits provided by the appellee. This, however, entirely begs the question here presented. Appellant is not under any principle of law bound to resign its membership as a condition precedent to challenging the legality of appellee's acts. Rather, it is fully entitled to remain a member and insist that appellee's affairs be conducted in a legal manner. The contrary hypothesis would permit any government or group to impose wholly illegal exactions upon its citizens or members and then answer a challenge of legality by simply saying that the citizen or member has benefited from the illegal conduct.

The appellant cannot successfully escape any legal impositions of the appellee corporation, but it submits that the dues program in this case is wholly tainted with illegality on the several grounds herein discussed and that this court should, by dismissal of this case rectify the intolerable situation in which appellant finds itself, leaving appellee to design a legally valid method of financing its operations.

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UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
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BRIEF OF APPELLEE

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRIFFITHS AND SPRAGUE STEVEDORING
COMPANY, INCORPORATED, a corpora-
tion,

Appellant,

vs.

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST, a corporation,

Appellee.

No. 11437

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The following additional statement is deemed necessary for a presentation of the questions involved:

Those eligible for membership in appellee are: those regularly engaged in the business of carrying cargo by water to or from any port on the Pacific Coast of the United States (except Alaska ports) and there are 84 such members designated as voting members; and those employing longshoremen or other shore employees in any of said ports, including stevedores and terminal operators, and any association of employers of such longshoremen or other shore em-

ployees or formed to deal with matters relating to such employments and there are 47 such members, including appellant, designated as associate members (Ex. 1, Art. V, R. 55; Finding 4, R. 37). All or substantially all eligible employers are members of appellee and of one or more of the hereinafter mentioned Port Associations (R. 516, 517).

Appellant since prior to the organization of appellee has been engaged as a stevedore in the performance of ship, dock and other shore work at ports in the State of Washington, employing longshoremen and other shore employees for that purpose, and since becoming an associate member of appellee in July, 1937, has at all times hired its longshore and other shore employees in accordance with and under labor agreements negotiated and administered by appellee (Finding 5, R. 37).

Appellee's corporate powers are vested in a Board of Directors with two members designated by each of the Port Associations as ex-officio members, and its officers are a President, one or more Vice Presidents, a Secretary and Treasurer (Ex. 1, Art. I, II, III, R. 57).

Appellee's principal purposes and objects are the representation of its members in matters relating to the employment of longshoremen and other shore employees, including the negotiation, execution and performance of contracts with groups or associations of longshoremen and other shore employees governing wages, hours and working conditions of such employment, and the development, establishment and mainte-

nance of safe working conditions and rules relating thereto (Ex. 1, Art. II, R. 51, 52, 56). Appellee enables its members to deal collectively with employees collectively, so as to work out labor agreements which give stability and minimum standards in the industry, whose labor pool is used interchangeably (R. 316, 354). The functions of appellee are in the labor field and it performs no functions for its members other than as related to this subject (R. 311, 335). It does not participate in the business policies of its members or in their dealings with those for whom they perform their services, except as related to its labor functions (R. 341).

Appellee at all times since its organization has been performing its purposes and objects on behalf of its members, including appellant (R. 300), and appellant at all times since becoming a member has fully participated in and fully enjoyed the benefits of membership (Finding 6, R. 38; Finding 17, R. 41).

Prior to the organization of appellee, so-called "Port Associations" at the four principal ports on the Pacific Coast, to-wit, Seattle, Portland, San Francisco and Los Angeles, were organized, having similar membership eligibility and similar purposes and objects, but limited in their respective functioning to each of said four principal ports and other ports in the general district adjacent thereto, which in the functioning of appellee are known respectively as the Washington, Oregon and California districts (R. 305, 306). Among the Port Associations is the Water-front Employers of Washington, herein called the

"Washington Association," a non-profit corporation of the State of Washington (Ex. 2, R. 78, 258).

As a result of the award in 1934 of the National Longshoremen's Board appointed by the President of the United States, a uniform coastwide longshore agreement for all ports on the Pacific Coast was established, which award as amended by subsequent negotiations between appellee and the Union representing longshoremen, remains in effect (Ex. 34, R. 307, 312, 313). This award made it necessary for the Port Associations to form an association on a coastwide basis resulting in the organization of appellee (R. 307-309). The then President of appellant, Joseph Weber, who was then a trustee of the Washington Association and had previously been its President (R. 408) was active in the organization of appellee (R. 309-311). He became an ex-officio member of the Board of Directors and continued as such until his retirement in 1941, and regularly attended its meetings which are held quarterly, one of which meetings is the annual meeting held in conjunction with the annual meeting of the membership (R. 310, 311, 410, 461, 462).

The Port Associations have continued their existence and became and have remained associate members of appellee (R. 311), the Port Associations at San Francisco and Los Angeles having subsequently consolidated into one Port Association for the State of California (R. 306, 371). The Port Associations have delegated authority to appellee in all matters pertaining to both coastwide and port labor relations for the

purpose of having a uniform policy on all labor matters on a coastwide basis (R. 311, 313, 314, 317).

Each of the Port Associations performs on behalf of its members requesting such service in connection with payrolls the functions of collective reporting and central pay office, financed by a payroll tax against the employers using the service. Collective reporting by a Port Association consists of making a collective report on behalf of its members using the service to the appropriate State and Federal agencies as required, pertaining to income tax withholding and social security contributions and deductions from payrolls. The central pay office consists of the operation of a central pay office where the individual employers deposit their payrolls and where the same are disbursed to the employees (R. 330, 336-339, 420; Ex. 3A, R. 95). Appellant has been a member of the Washington Association since its organization (R. 259) and has at all times availed itself of the collective reporting and central pay office services of the Washington Association. F. E. Settersten, President of appellant (R. 301), is a trustee of the Washington Association, and a member of its Finance Committee (R. 411).

The primary, but by no means the only important, labor function of appellee is the negotiation and administration of the coastwide longshore agreement (R. 321, 322; Ex. 34, R. 141). The longshoremen in each port employed under that agreement work interchangeably for the several employers in each port (R. 354) and the agreement provides for the hiring of

all longshoremen through hiring halls maintained and operated jointly by and at the equal expense of the Union and appellee (R. 325; Ex. 34, Sec. 4, R. 150). There are 15 such hiring halls, of which one is at Seattle and 5 in the other ports in the Washington district (R. 324, 325, 393). In order to administer the terms of said agreement and the dispatching of longshoremen from the hiring halls there has been established under the agreement a Port Labor Relations Committee in each port, consisting of three representatives of appellee and three representatives of the Union (Ex. 34, Sec. 9, R. 152, 393). M. J. Weber, the Vice President of appellant, has been the representative of appellee on the Port Labor Relations Committee for the Port of Seattle for the past three years (R. 413). A Port Labor Relations Committee in administering the affairs of a hiring hall maintains and operates the same and has complete control of the registration of all longshoremen and the decision of all questions regarding rotation of employment and the determination of the organization of gangs and methods of dispatching and the allocation of men among employers where the demand for men exceeds the available supply (R. 333, 351, 352). In the matter of allocation the Port Labor Relations Committee for the Port of Seattle maintains an Advisory Committee on Allocation and said M. J. Weber served on that committee in 1942 (R. 412).

It is the duty of the Port Labor Relations Committee to determine any question involving the interpretation of the longshore agreement and to decide any

dispute arising thereunder. There has likewise been established under said agreement a Coast Labor Relations Committee consisting of three representatives of appellee and three representatives of the Union. The Coast Labor Relations Committee has the power to set aside any decision or other action of any Port Labor Relations Committee and has the power and duty to establish uniform coast working and dispatching rules and to interpret and apply the same. Disagreements which are not settled by the Coast Labor Relations Committee are to be settled by the Coast Arbitrator, provided for in said agreement, and in the process of determining disputes under said agreement there have been some 200 hearings and awards of arbitrators (R. 326, 327, 393, 394; Ex. 34, Sec. 9, R. 152).

In addition to the negotiation and administration of the coastwide longshore agreement, appellee determines the policy, with power of final decision, on all local or so-called port labor agreements (R. 313, 317, 318), of which there are approximately 34 in number (R. 311), covering various classifications of waterfront labor (Ex. 35; R. 315). The men working on the waterfront in the various classifications under said agreements are likewise used interchangeably by the several employers (R. 314, 354).

Commencing with the war emergency, in addition to the administration of the longshore agreement by the parties through the Port Labor Relations Committees, the Coast Labor Relations Committee and the Coast Arbitrator, the War Shipping Administration

created the Pacific Coast Maritime Industry Board, a tri-partite Board consisting of two public members, two union members and two members representing appellee, which Board met on an average of once a week and had for its purpose the increasing of efficiency in cargo handling on the Pacific Coast in the interests of the procurement agencies of the Government engaged in the operations of vessels, to-wit: the War Shipping Administration, the War Department, hereinafter referred to as the "Army," and the Department of the Navy, hereinafter referred to as the "Navy" (R. 327, 328, 331, 332). Some 30 cases relating to labor problems in the industry were processed before this Board in formal hearings and much of the statistical data required by this Board was supplied by appellee (R. 328, 333). Representatives of these procurement agencies attend meetings of the Labor Relations Committee, Board of Directors and membership of appellee as they are vitally interested in being informed concerning the labor problems discussed and desire to cooperate and at times to make proposals (R. 311, 356, 357). These procurement agencies rely upon appellee for help in the labor field, including the obtaining of data on accident prevention and information as to labor agreements, conditions and practices (Finding 8, R. 38, 349). Appellee is relied upon to keep these procurement agencies informed on labor disputes and the remedies therefor and to lead the way in the prevention of pilferage (R. 335). In connection with contracts of its members, appellee provides these procurement agencies with copies of the various labor agreements and gives

notice of impending or actual labor disputes and impending changes in agreements which may result in additional expense (R. 356).

Since its organization appellee has maintained an Accident Prevention Bureau, having the functions its name implies (R. 339, 340), and headed by a Chief Safety Engineer and his assistant, with a staff of resident engineers in each of the four principal ports, three of whom are located in the Port of Seattle, together with an office staff in each of the four principal ports (R. 340). The budget for this activity for the year 1944 was \$80,000.00 and for the year 1945 was \$100,000.00 (R. 340, 407). In each port local committees of members of appellee, known as the Accident Prevention Committee, are formed to assist in the work of the Bureau (R. 340). The Bureau performs all services to indicate what is safe and what is unsafe equipment and how to make unsafe equipment safe (R. 347). When an issue of safety arises on the job the resident engineer is called and makes an inspection and requests that the necessary correction be made by the employer (R. 344). The Bureau carries on an educational program among the employees in safety matters and furnishes consulting services to employers and to the government agencies interested in accident prevention and the procurement agencies have extensively utilized these services (R. 347-349). The Bureau has established a code of safe practices (R. 348). Before the organization of appellee such safety work was being carried on and Joseph Weber, the then President of appellant, on the organization of appellee, assisted in the organization of the Bureau

and was a member of the Accident Prevention Committee of the Port of Seattle from the beginning, being succeeded by F. E. Settersten, the present President of appellant, in 1940 (R. 408, 409, 411). In 1939, M. J. Weber, the Vice President of appellant, likewise became a member of the Accident Prevention Committee for the Port of Seattle and remains a member, having been Chairman of an important subcommittee in 1941 and Chairman of the Accident Prevention Committee in 1944 (R. 411, 412). Accident prevention is a vital phase of labor relations and the activities of the Bureau have been a significant factor in reducing accidents and thereby the cost of compensation insurance (R. 340, 342). The average cost of off shore compensation insurance for members of appellee is 8.6% of the payroll as against 15% of the payroll of employers on the East Coast of the United States where similar accident prevention work is not being carried on (R. 340, 407).

In addition to its officers with headquarters in San Francisco, appellee there maintains the following staff, to-wit: a research man, two statisticians, legal counsel and clerical and office personnel; also port offices and staffs at each of the four principal ports, consisting of a port manager and assistants, legal counsel and clerical and office personnel with an assistant port manager at the Port of Tacoma (R. 328-330, 357, 359). The port manager acts as one of the three members representing appellee on the Port Labor Relations Committee in each of the four principal ports and supervises the work of the Port Labor Relations Committee at such ports and the work of the

Port Labor Relations Committees in the other ports in his district, as well as all committees of appellee in the district (R. 349, 350). The staff of appellee in administering labor agreements secures observance of the same, directs the handling of all disputes which arise and prepares all necessary factual material and presents the same before the Port Labor Relations Committees, the Coast Labor Relations Committee and the Coast Arbitrator (R. 329, 350). The administration of the longshore agreement involves all the labor problems incident to an industry covering normally 15,000 men in 24 ports (R. 323, 324). The staff of appellee also supervises the work of the Port Labor Relations Committees in the supervision of the hiring halls. The staff of the hiring hall in the Port of Seattle consists of a chief dispatcher, three assistants, a clerk and two janitors (R. 351).

Appellee studies all legislative measures directly affecting its members, reporting thereon to its members and taking such action as may be indicated (R. 355). Appellee acts for its members in connection with questions involving the application of the Fair Labor Standards Act to the industry and likewise handles for its members labor problems within the jurisdiction of the National Labor Relations Board and of the National War Labor Board (R. 334, 405, 406).

Reports on all of its activities are given to the Board of Directors at its meetings and the members of the Board of Directors in turn make reports to the membership in the various districts following each quarterly meeting (R. 476, 477). Action taken by

the Board of Directors or by the membership on special subjects is reported in writing to all members (R. 518-521). The President of appellee attends meetings of the Port Associations and makes reports on the activities of appellee (R. 477). Appellee operates on a budget and monthly financial statements are submitted to the Board of Directors and an annual financial statement is submitted to the annual membership meeting (R. 519, 520). The records of appellee are open for inspection by the members (R. 521).

On the organization of appellee the method of financing its activities was thoroughly and fully discussed and Joseph Weber, the then President of appellant, was active in these discussions (R. 362, 363), which finally resulted in the unanimous adoption (R. 364) of the by-law provision giving to the Board of Directors the power:

“To levy and assess and collect, and provide for the collection of, dues or assessments in accordance with the provisions of these by-laws * * *.” (Art. IV(f), R. 59)

and the by-law provision that:

“In fixing all dues and levying all assessments, the Board of Directors shall determine the amount to be paid by each member per ton of cargo loaded and/or discharged at each United States Pacific Coast port (except Alaska ports) * * *.” (Art. XVI, R. 72)

The amount to be so paid by each member is referred to as the “tonnage assessment.” Inasmuch as the by-laws specify the method of assessment there remains only for the Board of Directors in levying the

assessment to determine the amount to be paid by each member per ton of cargo.

By resolution of July 31, 1937 (Ex. 3A, R. 95, 529, 530) the Board of Directors levied the tonnage assessment and fixed the rate. This action was ratified by all members (Ex. 7, R. 99, 549, 550). The rate was increased to the present level by resolution of May 11, 1938 (Ex. 5, R. 97) and confirmed by subsequent resolutions (Ex. 7, R. 99; Ex. 17, R. 115), all of which are admitted by appellant to have been duly adopted (R. 260, 266, 267, 279).

The tonnage assessment method was adopted in part as the result of the previous experience of the Port Associations indicating the necessity for such a simple uniform assessment (R. 363, 364). It affects all members who load or discharge cargo alike and falls equally on all members. The failure of appellant to pay the full tonnage assessment owing by it for the years 1943 and 1944 resulted in this action.

Additional statement as necessary will be made in connection with the argument on each of the specification of errors argued by appellant.

ARGUMENT

The Tonnage Assessment Is a Valid Assessment Against Members of Appellee for Its General Support and to Enable It To Perform Its Purposes and Objects and Is Not Contrary to Public Policy.

By its specification of errors appellant asserts that the trial court erred in failing to conclude as a matter of law that appellee's claim is contrary to public pol-

icy and therefore void and unenforceable (Br. 6, 7). This appellant asserts is its "primary defense" (R. 254).

Appellant does not urge that the purposes and objects of appellee are contrary to public policy or that it would be unlawful for it to obtain funds for its support from its members. The argument is limited to the proposition that the "specific dues program," namely, the tonnage assessment, is a method which cannot be lawfully employed insofar as the amount per ton is measured by the tonnage of cargo loaded or discharged by appellant for the Army. It is said that by such application of the tonnage assessment appellee inevitably seeks to finance its operations by adding to the costs of "public contracts" made by its members and that this is contrary to public policy, thus making the tonnage assessment illegal and void (Br. 8). It is not contended that such result follows where "public contracts" are not involved. The claimed illegality is therefore precisely limited.

In considering appellant's argument on this issue it must be assumed that but for the claimed violation of public policy there is liability for the tonnage assessment. Other alleged defenses to liability intermingled by appellant in its discussion will be dealt with in connection with the specific argument on such issues.

The trial court found:

"In order for the defendant to have handled the loading of cargo upon and discharging from vessels for the Army it needed the services performed by plaintiff and if it had not secured such

services from plaintiff the defendant would have needed to have furnished them itself at a much greater cost to defendant than the assessments levied and charged by plaintiff.” (Finding 15, R. 40)

“The said tonnage assessment is * * * a just and equitable amount to be paid by the members of the plaintiff to provide for the general support of the plaintiff and is commensurate with the value of the services performed by the plaintiff which its members, including the defendant, have enjoyed and needed.” (Finding 17, R. 41)

Inasmuch as neither of these findings are challenged by appellant, it may be seen at the outset that the tonnage assessment owing by appellant merely amounts to just reimbursement to appellee for needed services rendered to and enjoyed by appellant.

Appellant having had more than value received for the amount here sought to be recovered and seeking to escape liability upon alleged grounds of public policy must, of course, sustain the burden of proving the alleged illegality. Such a defense under the circumstances here presented is clearly a “very dishonest one” and “is only allowed for public considerations, and in order the better to secure the public against dishonest transactions.” *Wilder v. Nolte*, 195 Wash. 1, 79 P.(2d) 682, 687. No such public considerations are here present in aid of appellant’s defense. Appellant hopes by this defense to be relieved of a legitimate obligation (R. 601).

The tonnage assessment is levied against members loading or discharging cargo and is measured by the

number of tons so loaded or discharged (R. 377, 430, 436). The liability for the tonnage assessment rests on the member who loads or discharges the cargo (R. 378). It is, of course, clear that the tonnage assessment is levied on and is payable only by members. This is not an action against the Army to recover a tonnage assessment levied against it. This action is against appellant to recover the tonnage assessment which it owes.

It is further clear that any member of appellee may elect to absorb any business expense, including the tonnage assessment, in its profits if it desires to do so. Like all business expenses, if the member does not recover the tonnage assessment from the person for whom the cargo was loaded or discharged, either as a special charge or otherwise, that is a matter wholly between the member and the person for whom the services are being performed.

There is no provision in appellee's by-laws requiring that any member shall collect the tonnage assessment from the person for whom cargo is loaded or discharged. It is true that the stevedore members initiated an agreement (Ex. 10, R. 105) subsequently signed by them, whereby they obligated themselves to collect the tonnage assessment from non-member steamship companies and that this agreement was approved by the Board of Directors (R. 378, 379, 507, 508; Ex. 8, R. 100; Ex. 9, R. 101). Appellant asserts that this agreement was not intended to include the procurement agencies, including the Army (Br. 15). This agreement will be further discussed on another issue (*infra* p. 48).

The trial court found:

“Commencing with the war emergency, in addition to many other activities, the plaintiff supplied much statistical data and assistance to the Pacific Coast Maritime Industry Board, the War Shipping Administration, the Army and the Navy in connection with labor matters, including accident prevention, and the government agencies and departments above-mentioned have made extensive use thereof.” (Finding 8, R. 38)

“* * *. As the preparations for war increased and on the advent of the war the cargoes loaded and discharged for the government increased until substantially all cargoes were being transported by agencies of the government, including in addition to the Army and the Navy, the War Shipping Administration, which latter agency took over substantially all private shipping operations.” (Finding 10, R. 39)

“The government agencies, the War Shipping Administration, the Army and the Navy have recognized the tonnage assessment to be a legitimate business expense of the member paying for the same and have allowed the tonnage assessment as a part of the overhead expense.” (Finding 16, R. 41)

Appellant questions only the last finding, although no error is specified thereon and it is amply supported by the testimony (R. 414).

In appellant's contract with the War Shipping Administration (Ex. 40), being a so-called cost-plus-a-fixed-fee contract with the fixed fee covering supervision, it is expressly provided that “contributions or payments made by the Stevedore for the maintenance

of hiring halls," referring to the tonnage assessment, are a "part of the Stevedore's general supervisory and administrative expense" (Part II, 1(b), R. 390).

It is clear that the procurement agencies, including the Army, have recognized the tonnage assessment for what it is, namely, a legitimate overhead expense for services needed by members in performing their contracts with the procurement agencies and others.

It is not disputed that from the organization of appellee its members have loaded and discharged cargo for various agencies of the government, including the Army, and have paid the tonnage assessment thereon. Appellant commenced to load and discharge cargo for the Army in 1940, but has not paid the tonnage assessment for the period subsequent to 1942 (Finding 10, R. 38, 39; Finding 19, R. 42), although it has continued the payment of the tonnage assessment on cargo loaded or discharged for the War Shipping Administration (Finding 14, R. 40).

Appellant asserts that the tonnage assessment is a plan to lay a toll upon every ton of cargo entering or leaving any Pacific Coast port, payable by every shipper, member, non-member or governmental agency as a condition to using the ports of the West Coast of the United States (Br. 30). This is a wholly inaccurate statement. The tonnage assessment is not a tax on the cargo and appellee claims no lien against the cargo or rights against the owner or bailee thereof. It claims only that its members are obligated under its by-laws to pay the tonnage assessment. If a non-member of appellee loads or discharges cargo, appellee claims no

right against either the cargo or anyone else to collect the tonnage assessment or any other form of assessment for loading or discharging cargo. Appellee does claim the right to collect a so-called man-hour charge from all non-members who secure longshoremen from the joint hiring halls for any purpose. The expense of these hiring halls is borne equally by appellee and the Union and this man-hour charge is for the purpose of a reasonably equitable reimbursement to appellee of the allocable costs to it of maintaining the hiring halls and for no other purposes (R. 360, 361). This man-hour charge is not involved in this action.

This brings us to a discussion of the authorities cited by appellant in support of its assertion that the tonnage assessment measured by the tonnage of cargo loaded or discharged for the Army is contrary to public policy and therefore illegal and void as adding to the costs of public contracts.

Reference will first be made to the case of *Electrical Contractors' Ass'n. v. A. S. Schulman El. Co.*, 391 Ill. 333, 63 N.E.(2d) 392, Appellate Court, 324 Ill. App. 28, 57 N.E.(2d) 220, relied upon in part by the trial court (R. 34) and which it is submitted fully supports the position of appellee. In that case the association members consisted of electrical contractor-dealers and dealers, the latter having no vote on matters concerning construction or labor working agreements. Under the by-laws membership dues were measured by a percentage of the business done by each. The association on behalf of its members was a party to a labor agreement administered by and at the expense of the association and performed various other services for its

members. In resisting payment of dues a dealer member contended that dues measured by a percentage of business done was against public policy as tending to stifle competition and to destroy competitive bidding. The court stated:

“The sole question in this case is as to the validity of the agreement as evidenced by the constitution and by-laws of the association. It is not a case where we need go beyond the instrument to determine the interpretation the parties placed upon it, but evidence was introduced to show the consideration each member received for the dues paid.” (p. 396)

The court, after quoting from Department of Commerce reports showing the large number of trade associations which collect dues on a sliding scale in proportion to the size or volume of business and which function in a similar manner and stating that “these activities are working in the public interest” (p. 397), concluded that the provision for dues was not contrary to public policy. The cases relied upon by appellant were relied upon unsuccessfully by the defendant in this case.

On the contention that the dues tend to stifle competition the court said:

“* * * courts are not privileged to ascribe illegal purposes where there is nothing in the contract from which such a conclusion may be reasonably drawn. In *Kellogg v. Larkin*, 3 Pin., Wis., 123, 56 Am. Dec. 164, it was said: ‘Before a court should determine a contract which has been made in good faith stipulating for nothing that is malum in se, nothing that is made malum prohibitum, to be void as contravening the policy of

the state, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical.'

"* * * .

"* * * . Can it be said that an agreement between contractors to pay dues to their association fixed at a percentage of the business done is an agreement which, without more, has the effect of stifling competition in bidding, whereas, if the same contractors paid their association dues at a flat rate and without regard to the amount of business done, it would not interfere with competitive bidding? We do not find that the basis of payment of dues has any just distinction. It must be conceded that either method may interfere with competitive bidding, but it is a matter which arises from other circumstances in connection with the making of the contract and does not rest solely upon the method by which the dues each member is to pay the association are computed. There is nothing in the mere form of payment of dues on a percentage basis that supports an inference that it has something sinister about it." (p. 395)

As to the contention that the dues tend to stifle competitive bidding, the court said:

"* * * . To adopt such a conclusion is to assume that dues paid will, in the course of time, be distributed to the members in the form of dividends. There is nothing in the constitution or by-laws to support it. It is a non-profit corporation and the accumulation of money or the division of it in form of dividends to the members is not provided. The objects of the association * * * contain no reference to contractors' interest in the earnings

of the association. The objects * * * clearly and definitely contain nothing that could be interpreted as a scheme among the members to control bidding or to stifle competition. Purpose number 4 calls for co-operative action among the members in all things bearing on the well-being of the industry. Such purpose is broad, but to say that it contains a design to stifle competition is to go beyond its plain terms and ascribe ulterior motives to the members of the association where there is no basis for it." (pp. 395, 396)

A further contention of the defendant that the dues would be added to the cost of the job was dealt with in the decision of the appellate court, as follows:

"One of the objections raised to the payment of dues proportionate to the volume of business done is that the percentage charged by the Association would be added to the cost. We cannot see that this is true or that such action would so result. The benefits that the members receive from the Association necessarily bring about a reduction in the bid, whereas if they had not received the benefits from the Association the bid would necessarily be higher. And we, therefore, cannot follow the reasoning that dues fixed on a basis proportionate to the volume of business done would be added to the cost of a job any more than if the dues were fixed on a flat rate. In each case, whether flat or proportionate, the dues would be administration expense and should be so considered. If flat rate dues are legal and appropriate, we see no reason why dues proportionate to the volume of business done by a member should be condemned.

"There is in proportionate dues no stifling of competition, no agreement that might injuriously

affect the public, and no restraint of trade; they only provide a method of determining a just and equitable amount to be paid by the member to the trade association for services actually rendered by the Association and actually received by the member. The member knows the basis of the dues when he joins the Association, and he is under no compulsion to join, but when he has joined and received the benefits and advantages of the Association, he cannot successfully claim that his contract to pay dues proportionate to the volume of business done by him is invalid and void unless it can be shown that such method of fixing dues is expressly contrary to the public policy of this State." (pp. 225, 226)

The supreme court on this subject said:

"* * *. It is our view that unless there is proof that such percentage was added to the contract price, there is nothing that condemns it as being against public policy any more than if the contractor had paid a like amount as a flat rate fixed without regard to the amount of business transacted. We apprehend that any dues which a member is required to pay at a flat rate would be carried as an overhead charge and would be reflected in the bids made, the same as any other overhead item." (p. 396)

No proof was offered that the tonnage assessment was added to appellant's Army contracts.

Appellant in attempting to distinguish this case asserts that it apparently did not involve a situation in which the members of the association were paying as dues a percentage of public contracts (Br. 27). It clearly appears that two of the contracts involved were public contracts (appellate court, p. 222).

With the exception of *Kentucky Association of Highway Contractors v. J. C. Williams*, 213 Ky. 167, 280 S.W. 937, 45 A.L.R. 544, and *Bailey v. Master Plumber Association*, 103 Tenn. 99, 53 S.W. 853, the remaining cases relied upon by appellant are applications of the rule announced in *Williston on Contracts*, Rev. Ed. Vol. 5, Sec. 1663, p. 4692, and held inapplicable in the *Electrical Contractors* case (Ill.):

“Bargains directly tending to chill competition, such as one that the successful bidder shall pay a percentage to his competitors, * * * constitute illegal stifling of competition. Competition may also be stifled by a bargain so to bid as to affect injuriously the final result of the competition though the number of bidders is not lessened.”

This same rule is likewise announced in *Restatement of the Law, Contracts*, Vol. II, Sec. 517, as follows:

“A bargain not to bid at an auction, or any public competition for a sale or contract, having as its primary object to stifle competition, is illegal.”

In *Comment a* to the rule, it is stated:

“The common case of the application of the rule stated in the Section is in bargains not to bid at auction sales or at other competitive sales. Competition may also be stifled, however, by an agreement so to bid as to affect injuriously the final result of the competition even though the number of bidders is not diminished (see *Illustration 6*).”

Illustration 6 reads:

“A, B, C and D, building contractors, agree with one another to form the X association and that in future bids for the award of building

contracts the successful bidder shall pay the X association 2 per cent of the gross amount of the price fixed in the contract awarded. The agreement between A, B, C and D is illegal."

In *Master Builders Association of Kansas v. Carson*, 132 Kan. 606, 296 Pac. 693, a typical example of *Illustration 6* was presented. The court held invalid a by-law of the association whose members were contractors, providing that the successful bidder should pay a percentage of the contract price of all work done, of which the association was to distribute one-half among unsuccessful bidders on the same contract.

In *Constructors Association of Western Pennsylvania v. Seeds*, 142 Pa. Super. Ct. 59, 15 Atl.(2d) 467, 469, it does not appear whether the association was one for non-profit, but the case is a further example of *Illustration 6*. The court held invalid a by-law of the association whose members were contractors providing for the payment to the association of a percentage of the contract price of all work done, stating:

"* * *. The percentage charged all members is obviously not a payment in the form of dues for services rendered by the association, but gives to such members an interest in the contract as it results in making a distribution to them through the association of a portion of the contract price. If the percentage were larger the effect thereof would become more evident. The principle, however, is the same. The natural tendency of the by-law to prevent and stifle competition, therefore, brings it within the classification set forth in section 517 of the Restatement * * *."

In *Associated Wisconsin Contractors v. Lathers*,

235 Wis. 14, 291 N.W. 770, 771, 772, a further example of *Illustration 6* is presented. The court held invalid a by-law of the association whose members were contractors providing for payment to the association of a percentage of the contract price of all work done. The court cited Restatement of the Law, Contracts, Sec. 517, and Williston on Contracts, Sec. 1663, *supra*, and stated:

“* * *. An agreement limited to having a common treasury into which a certain percentage of the revenue from public contracts is to be paid falls under condemnation of the rule protecting the freedom and integrity of competition in securing contracts for public work. * * *.

“* * *. The public policy which insists upon competition between bidders for public work and dictates that contracts shall be let to the lowest responsible bidder is violated when prospective bidders enter into an arrangement to exact from each other a percentage ‘of the amount of each contract secured’ * * *.

“* * *.

“* * *. We consider the complaint as showing the respondent is exacting dues from its members measured by the amount of contracts for highway construction obtained by a member without corresponding benefit to the public, and as containing no allegation of facts that take the case out from under the rule.”

In reference to this case the appellate court in the *Electrical Contractors* case (Ill.) states:

“If the above decision is based, as we presume it is, on the fact that there was no allegation or proof that the Association had rendered services

to the bidder commensurate with the percentage charged, then we agree with it. We cannot presume that a trade association would arbitrarily fix its dues on the basis of volume of business done and not render services for the dues charged. But if the above decision is based on the broad principle that a trade association cannot be paid according to the value of the services rendered to its members, then we disagree with it. If it had been proved that members in that case had been enabled, through the services and cooperation of the Association, to bid a lower amount than they would otherwise, and were enabled, through the services and cooperation of the Association, to furnish skilled labor and avoid labor disputes and other difficulties, then the Wisconsin court would doubtless have taken a different view of the question presented." (p. 226)

and the supreme court states:

"* * * we do not agree that any inference that the public is going to be injured arises from the mere fact that the money collected from each member was computed on the percentage of the business done." (p. 396)

In *Kentucky Association of Highway Contractors v. J. C. Williams*, 213 Ky. 167, 280 S.W. 937, 45 A.L.R. 544, 547, 548, the court held invalid a by-law of the association whose members were contractors, providing for the payment to the association of a percentage of the contract price of public highway work. The court apparently did not rest its decision on the rules of law governing the three previous cases referred to and relied upon by appellant, but held as a matter of public policy of the State of Kentucky that such a by-law must be condemned as having "a ten-

dency to be injurious to the public or against the public good" and this "regardless of the lawful intent of the parties in making it, and also regardless of the further fact that the public may not have been injured in the particular instance." That the decision in this case is so limited is stated in *Jackson v. Sullivan*, 276 Ky. 666, 124 S.W. 1019, 121 A.L.R. 341, 343, where it is said:

"* * *. This case does not bear any great weight on the question of unreasonable restraint of trade or restriction of competition, but is applicable as illustrating the attitude of this court towards agreements and combinations having a tendency to be hurtful to the public interest."

Appellant cites no decision so announcing the public policy of either Washington or California.

In the annotation to this case in 45 A.L.R. 549, it is stated:

"The rule in the United States is settled that an agreement between contractors bidding for public work, which tends to suppress or stifle competition, is against public policy and void." (p. 549)

The qualification to this rule is stated:

"The co-operation of public contractors to accomplish an object which neither could gain if acting in his individual capacity is not within the rule, though it may prevent the rivalry of the parties, and thus lessen competition." (p. 551)

Appellant asserts that the statement of purposes of the Kentucky association are fully as laudable as those of appellee (Br. 18). With this appellee cannot

agree. The purpose of the Kentucky association, as shown by its articles, was solely to assist the members in connection with matters pertaining to the obtaining and performance of public contracts on a basis "tending to raise the standing of contractors in the business world" (p. 545). Whatever such general language may mean, it is clear that it has to do with matters pertaining to the business relations between the members of the association and those for whom they worked. This is not true as to appellee, whose functions are in the labor field. It performs no functions for its members other than as related to this subject and does not participate in the business policies of its members or in their dealings with those for whom they perform their services, except as related to these labor functions (R. 335, 341).

In commenting on this case the appellate court, in the *Electrical Contractors* case (Ill.) stated:

"The above case appears to hold that it is immaterial whether the plaintiff Association rendered a service to its members commensurate with the dues charged. We have held that the plaintiff Association did render services to its members commensurate with the dues it charged, and we are not in accord with the finding announced in the above Kentucky case. Under the holding of that court, any expense which was figured by the bidder as administration expense might be used to hold the contract void. Under that decision if flat rate dues in a trade association had been figured as a portion of the administration overhead expense, then such flat rate dues would be proportionately added to the bid for the public work, and thus neither flat rate

nor proportionate rate would be held legal. The decision in effect condemns all overhead expense, and might be carried to the extreme of holding as excessive the salaries of officers of bidders. We disagree with the principle announced in this case and cannot subscribe to its reasoning." (p. 226)

The supreme court in affirming the decision of the appellate court refused to adopt the reasoning in the *Kentucky Association* case (Ky.) (p. 396).

In the annotation to the *Electrical Contractors* case (Ill.) in 161 A.L.R. 795, 800, the decision in the *Kentucky Association* case (Ky.) is criticized in part as follows:

"It is submitted that when a court holds, as a matter of law and without supporting evidence, that the payment of dues proportioned to business done has a tendency to raise prices, it ignores the facts. It ignores the probability that the association gives the dues-payer his money's worth, and that it can perform services which actually result in reduced prices to the public."

The rule set forth in Restatement of the Law, Contracts, Sec. 517, in *Comment c*, provides:

"The rule stated in the Section has no application where things are not offered for competitive bidding."

In the foregoing cases relied upon by appellant it is clearly indicated that the contracts involved were those resulting from competitive bids. The contracts between appellant and the Army (Exs. 37, 38, 39) were not entered into as a result of competitive bidding. These contracts were made pursuant to the

First War Powers Act, 1941, Title 50 U.S.C.A. App. §611, providing that:

“The President may authorize any department * * * of the Government exercising functions in connection with the prosecution of the war effort * * * to enter into contracts * * * without regard to the provisions of law relating to the making * * * of contracts * * *.”

By Executive Order 9001, Title 50 U.S.C.A. App., p. 242, following §611, it is provided in Title I, Sec. 1, that the:

“* * * War Department, the Navy Department, and the United States Maritime Commission * * * are authorized * * * to enter into contracts * * * without regard to the provisions of law relating to the making * * * of contracts.”

and by Sec. 4 that:

“Advertising, competitive bidding and bid * * * need not be required.”

All of the contracts here involved, pursuant to which appellant loaded and discharged cargo for the Army show on their face that they were not made under the provisions of statutes requiring competitive bidding, but were negotiated contracts under authority of the First War Powers Act, 1941, and Executive Order 9001. Exhibit 37, covering the period September 1, 1942, to June 30, 1943, and Exhibit 38, covering the period July 1, 1943, to June 30, 1944, each on its face states that it is a “negotiated contract.” Both of these contracts were thereafter amended from time to time and it is clear that neither the contracts nor the amendments were made as a result of competitive bidding. Exhibit 39, covering the period July

1, 1944, to June 30, 1945, was the final evolution of the form of contract under the First War Powers Act, 1941, and Executive Order 9001, and abandons all irrelevant reference to bids, offers and acceptances and states on its face:

“This contract is authorized by the First War Powers Act, 1941, and Executive Order 9001, dated December 27, 1941.”

This contract was likewise amended from time to time and it is clear that neither the contract nor the amendments were made as the result of competitive bidding.

These contracts are all subject to renegotiation for the purpose of recapture by the government of excessive profits (Title 50 U.S.C.A. App., §1191(a)(4)). It is apparent that under negotiated contracts wherein the government has the right of renegotiation, the basis for the rule which appellant urges no longer exists. Irrespective of the contract price contractors are not permitted to retain excessive profits.

Every case must be determined upon its peculiar facts and circumstances, and the courts, before condemning an agreement “must see that the agreement is such as really destroys the value of competitive bidding * * *.” *Hyer v. Richmond Traction Co.*, 168 U.S. 471, 480; *Hegness v. Chilberg*, 224 Fed. 28 (C. C.A. 9).

It is affirmatively shown that the services of appellee enabled appellant to perform its contracts with the Army at a less cost than if the services had not been performed (Finding 15, R. 40). The tonnage

assessment, therefore, rather than having an "evil tendency" to injure the public has on the contrary an actual beneficial result in reducing or tending to reduce the costs to the public. The tonnage assessment does not result or tend to result in an addition to contract prices, but results or tends to result in a reduction.

In *Bailey v. Master Plumber Association*, 103 Tenn. 99, 53 S.W. 853, the last case cited by appellant and not further discussed in its brief, an association of plumbers which required its members to report all business done in competition with other members and to pay the association an agreed amount for each article sold, was held to be an organization in restraint of trade. This case involves principles of law entirely foreign to the issue here.

The Tonnage Assessment Is a Uniform Assessment Falling Equally and Alike on All Members of Appellee, Both Voting and Associate.

Appellant specifies as error the finding of the trial court that:

"The said tonnage assessment is a uniform assessment falling equally and alike on all members of the plaintiff, both voting and associate, who load or discharge cargo upon or from vessels on the Pacific Coast * * *." (Finding 17, R. 41)

and specifies as error the failure of the trial court to find to the contrary and to conclude therefrom that appellee's claim is unenforceable (Br. 6, 30). These contentions are made in the face of the trial court's findings, which are not here attacked, that the ton-

nage assessment is commensurate with the value of the services performed and if it had not secured such services from appellee the appellant would have needed to have furnished them itself at a much greater cost (Finding 15, R. 40, 41; Finding 17, R. 41).

Appellant asserts that inasmuch as only those members who load or discharge cargo are subject to the tonnage assessment that the assessment lacks uniformity and that under Sec. 598(10) of Title XII, Part 4, Division 1, of the California Civil Code, uniformity is required.

We will first assume with appellant that uniformity of assessment is mandatory as a basis for recovery against appellant. The statute provides that the by-laws may make provision for dues and assessments and that they—

“may be authorized to be levied upon all classes of membership alike, or in different amounts or proportions or upon a different basis upon different classes of membership and memberships of one or more classes may be made exempt from either dues or assessments, or both.”

The tonnage assessment is uniform as to all members, no distinction being made between voting and associate members. Each member loading or discharging cargo is assessed at the tonnage assessment rate measured by the tonnage of cargo.

Appellant asserts that the tonnage assessment lacks uniformity because members who do not load or discharge cargo are not required to pay for the support of appellee. This, we submit, goes not to the question of uniform application of the tonnage assessment, but

amounts only to an argument that some other method of assessment should be employed in spreading the cost of maintaining appellee. As long as the method of assessment, whatever it may be, is of uniform application it cannot successfully be attacked by appellant as invalid merely on the argument that perhaps some other method of assessment not specified would be preferable or more appropriate. It must be assumed in the absence of evidence to the contrary that the method of assessment fixed by the by-laws and employed since the organization of appellee fairly and reasonably distributes the burden of its support.

Appellant asserts that the tonnage assessment unwarrantedly invents classification of members who load or discharge cargo and those who do not, whereas the classifications fixed by the articles are voting and associate members. The tonnage assessment does not create different classes of members; it levies a uniform charge on all members who load or discharge cargo. Appellant asserts that it would be novel for a social club to have different classes of membership but to provide for the support of the club by an assessment against members who use certain specified facilities. We do not know whether such a plan is novel or not, but it would certainly not be subject to attack as being illegal for lack of uniformity and that is the basis of the alleged illegality.

The method of assessment is clearly a matter for self-determination by appellee and as long as it is uniform in its application it is not vulnerable to attack for illegality by any member who may have a differ-

ent view as to the method which should have been but was not adopted. In this case appellant participated in and approved the adoption of the method of assessment which it now criticizes (*supra*, p. 12).

The right of appellee to levy an assessment for its support is analogous to a tax levied for the support of government. Both the taxpayer and a member of appellee while remaining in such status are bound by the sovereign power of taxation in the one case and contractual right of assessment in the other. The taxpayer by removal from the jurisdiction of the sovereign may escape taxation and the member by resignation may escape assessment.

It is believed that the uniformity of assessment asserted by appellant to be required is somewhat analogous to the uniformity required under the equal protection clause of the Fourteenth Amendment in matters of taxation.

As stated in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522:

“A tax is not an assessment of benefits. It is * * * a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. * * *. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that

it exists primarily to provide for the common good."

In *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 179, 180, the court said in reference to an occupation tax:

"* * * the state * * * may select those who are engaged in one class of business and exclude others, if all similarly situated are brought within the class and all members of the class are dealt with according to uniform rules."

In that case an occupation tax on all persons engaged in mining or producing ore was held valid even though it did not include those engaged in mining as contractors or those who did extensive development work but removed no ore.

In *Illinois Central R. Co. v. Minnesota*, 309 U.S. 157, 163, an attack was made upon a Minnesota tax imposing upon every railroad owning lines in the state a percentage tax on gross earnings derived from operations within the state. The railroad attacking the tax received items of gross earnings subject to taxation resulting from credit balances representing payments received for the use of its freight cars from other railroads which operated in the state. It was contended that the formula used for determining the tax worked unequally and that because of having a nominal trackage in the state it was penalized as against railroads with no trackage in the state, but having like revenues from rentals of cars used in the state. In respect to these contentions the court said:

"* * *. Appellant is not singled out for special

treatment. It is not taxed on one formula; the others, on another. They are all taxed pursuant to the same formula * * *.

“* * *. Companies not owning or operating roads within the state are not reached by this tax statute; roads that do are. That certainly is not discrimination in the constitutional sense. Appellant has subjected itself to the jurisdiction of Minnesota. Those doing likewise are similarly treated by the state * * *. The fact that that entails burdens is part of the price for enjoyment of the privileges which Minnesota extends.”

In *Colgate v. Harvey*, 296 U.S. 404, the general law on this subject is stated:

“* * * absolute equality in taxation cannot be obtained and is not required under the Fourteenth Amendment. * * *. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied. * * *. (p. 422)

“* * *.

“The question of equal protection must be decided in respect of the general classification rather than by the chance incidence of the tax in particular instances or with respect to particular taxpayers. ‘And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification are not sufficient to defeat the law.’ * * *. ‘The operation of a general rule will seldom be the same for everyone. If the accidents of trade lead to inequality or hardship, the consequences must be

accepted as inherent in government by law instead of government by edict'." (p. 436)

In the dissenting opinion the following statement of the general law is of interest:

"All taxes must of necessity be levied by general rules capable of practical administration. In drawing the line between the taxed and the untaxed the equal protection clause does not command the impossible or the impractical. Unless the line which the state draws is so wide of the mark as palpably to have no reasonable relation to the legitimate end, it is not for the judicial power to reject it and say that another must be substituted." (p. 442)

So here any assessment levied by appellee must be capable of practical administration. The tonnage assessment falls with equal burden on all members. An assessment on a tonnage basis has both the virtue of uniformity in application and ease of practical administration. Such an assessment places the burden at the point where it belongs, namely, when the cargo is loaded or when it is discharged, and only once. Simplicity of assessment was one of the fundamental reasons for adopting the tonnage assessment method. That method advises all shippers to or from ports on the Pacific Coast with certainty of the costs involved, which is of a uniform amount and uniform as to all cargo. This is of no small consequence in the practical administration of the assessment and was one of the material factors resulting in this choice of assessment on members (R. 363, 364).

We have so far assumed with appellant, contrary to the applicable law, that uniformity of assessment

is essential to establish appellant's liability for the tonnage assessment. Appellant cites *Alfalfa Growers of California v. Icardo* (Cal.) 256 Pac. 287, a decision of the district court of appeals involving a non-profit cooperative association organized under the then provisions of Secs. 653m to 653sc of the California Civil Code, subsequently repealed by Stats. 1931, p. 1839. Appellant quotes (Br. 34) from the decision in that case to the effect that assessments by corporations which have no capital stock must be equal and uniform even when the power is claimed to exist by contract. The quoted language is mere dictum as the court held that the cooperative in question was without authority to levy the assessments in view of the fact that there were no provisions therefor in the sections of the Civil Code under which it was organized or in the then applicable provisions of the Civil Code, Sec. 331, pertaining to general corporations, which has since been amended to provide for such assessments. The concurring member of the court did not join in approving the dictum to the effect that lack of uniformity would destroy the contractual obligation of the member. The statute under which appellee is organized and the amendment to the Civil Code, Sec. 331, not only expressly provides for assessment, but permits of different treatment of different classes of members. No other authority can be found which is in accord with the dictum in this case. The case cites no authority for the dictum and the case itself has never been cited by any other court. In any event, a consideration of the facts in that case on which the court concluded that there was

an unjust discrimination between members, will disclose that the same has no application to the facts here and apparently appellant does not contend to the contrary, as it makes no attempt to show any similarity.

Appellant is not in a position to and is estopped from raising any question of lack of uniformity. It is bound by contract to pay the assessment, whether it lacks uniformity or not.

It is well settled that the relation of members to each other and to an organization such as appellee is contractual and the articles of association or incorporation or by-laws constitute the terms of their agreement. This appellant apparently concedes (Br. 41).

In *Child v. Idaho Hewer Mines*, 155 Wash. 280, 284 Pac. 80, 84, the articles and by-laws of a corporation provided for the right to levy an assessment and the court stated:

“The authorities all hold that provisions such as these incorporated in the articles of incorporation and by-laws of a company have the force and effect of a contract between the stockholder and the corporation.”

See:

Omaha Law Library Ass'n. v. Connell, 55 Neb. 396, 75 N.W. 837;

Blue Mountain Forest Ass'n. v. Borrowe, 71 N.H. 69, 51 Atl. 670, 672, 673;

Swanger v. Porter, 87 Neb. 764, 128 N.W. 516, 519;

Rogers v. Boston Club, 205 Mass. 261, 91 N.E. 321, 323;

Boston Club v. Potter, 212 Mass. 23, 98 N. E. 614, 615;

Big Creek Ditch Co. v. Hulick, 130 Ore. 401, 280 Pac. 492, 494;

Harris v. Northern Blue Grass Land Co., 185 Fed. 192, 194 (C.C. Wis.);

6 A Cal. Jur. §542.

It is likewise well settled that as long as one remains a member of an organization such as appellee, the contractual relationship created by the articles or by-laws remains in effect.

In *Anderson v. Amidon*, 114 Minn. 202, 130 N.W. 1002, 1004, the association was formed for social and literary purposes and to promote the commercial interests of a village, and the articles provided for annual dues. The court held:

“* * * the relation of the members to each other and to the organization is contractual, and the articles of association or by-laws constitute the terms of their agreement.

“* * *. * * * when a person becomes a member, and subscribes to the rules and by-laws imposing the same, he thereby becomes legally liable to pay and discharge his obligations in this respect, so long as the association remains a going concern and he remains a member. * * *. The law in such case will imply a promise to pay, and the consideration necessary to support the same is found in the united undertaking and the mutual promises of the several members to the same effect.”

See:

Annandale Golf Club v. Smith, 110 Cal. A. 765, 289 Pac. 806.

It is apparent from the foregoing authorities that appellant is contractually obligated to pay the tonnage assessment, irrespective of any argument presented as to its alleged lack of uniformity. By becoming a member it contracted to do so and it is liable on its contract.

It is recognized by appellant and found by the trial court that it has always recognized its obligation to pay the tonnage assessment on cargo which it loaded or discharged for non-members and has continued to pay this obligation on all such cargo other than Army cargo, the last such payment on cargo loaded or discharged for the War Shipping Administration being made after the commencement of this action (Finding 14, R. 40).

It is scarcely compatible with this conduct for appellant at this late date to assert that it should be permitted to remain a member, as it elected to do, but should now be relieved of the obligation to pay for services which it received, which, as the trial court has found, would have had to be performed by appellant if not furnish by appellee and at a cost exceeding the tonnage assessment which appellee seeks to recover. Inasmuch as appellant is in fact being called upon only to pay the reasonable value of services furnished to it, it would be unconscionable to permit it to escape its obligation on the basis of an argument that perhaps some other method of assessment might also have resulted in some further cost to some other member.

In *Big Creek Ditch Co. v. Hulick*, 130 Ore. 401,

280 Pac. 492, 494, a stockholder in a non-profit corporation, engaged in furnishing irrigation services to its stockholders, similarly sought, but unsuccessfully, to avoid liability for such service on the ground that the assessment levied on account thereof pursuant to the by-laws was unlawful. The court stated:

“But, even if an express contract between the corporation and the defendant had not been shown, the delivery of the water by the corporation to the defendant, his acceptance, use and application of it for beneficial purposes on his land, would raise by implication of law a promise upon his part to pay the corporation for the services performed in the delivery of the water.

* * *

“* * *. It was his duty, therefore, to pay the amount of the assessment * * *.”

In 1943 appellant used from the hiring halls maintained at the expense of appellee approximately 42% of the total man hours employed in the Puget Sound district in loading and discharging vessels, and 15% of the total man hours employed in dock work (Ex. 41, R. 181, 398, 399, 402) and 53% of the total man hours employed in the Port of Seattle in loading and discharging vessels and 40% of the total man hours employed in both loading and discharging and dock work (Ex. 43, R. 183, 400, 401). In 1944 appellant used from the hiring halls maintained at the expense of appellee approximately 43% of the total man hours employed in the Puget Sound district in loading and discharging vessels, and 15% of the total man hours employed in dock work (Ex. 42, R. 182, 399), and 63% of the total man hours employed in the Port of

Seattle in loading and discharging vessels and 40% of the total man hours employed in both loading and discharging vessels and dock work (Ex. 44, R. 184, 401). From these percentages it is at once apparent that appellant was one of the largest users of appellee's services.

All Members, Voting and Associate Alike, Are Subject to Liability for the Tonnage Assessment Under Appellee's By-Laws.

Appellant specifies as error the failure of the trial court to make a conclusion of law that appellee is without power to levy and collect dues from an associate member (Br. 7, 36).

The by-laws empower the Board of Directors to levy dues and assessments in accordance with the provisions of the by-laws (Art. IV(f), R. 59) and further provide that:

“In fixing all dues and levying all assessments, the Board of Directors shall determine the amount to be paid by each member per ton of cargo loaded and/or discharged * * *.” (Art. XVI, R. 72)

Inasmuch as the by-laws specify the method of assessment and who is to pay it there remains only for the Board of Directors in levying the assessment to determine the amount to be paid per ton of cargo.

The by-laws state that “each member” shall pay the assessment, not that the voting members or the associate members shall pay the assessment. The expression “each member” clearly includes both voting and associate members. Appellant apparently con-

cedes as much, but asserts that "other provisions of the by-laws and the practices followed cast a very different light on the situation" (Br. 37).

Appellant points out that on dissolution the remaining assets are to be divided among the voting members only (Art. XXI, R. 77). Appellant argues that such a provision is unfavorable to associate members, but concedes that associate members could so agree (Br. 38). The provision for division of assets on dissolution has no bearing on and cannot assist in the construction of the unambiguous by-law provision imposing the tonnage assessment on all members.

Appellant points out that an initiation fee is provided for voting members, but that associate members are not required to pay an initiation fee unless otherwise directed by the Board of Directors (Art. XV, R. 71). The provision concerning initiation fees has no bearing on and cannot assist in the construction of the unambiguous by-law provision imposing the tonnage assessment on all members.

It should be noted, however, that in providing for resignation of any member it is specifically provided "that no such resignation shall become effective until full payment of all arrears for dues and assessments to which such member has become liable" (Art. XIX, R. 75). This is consistent with the imposition of the tonnage assessment on all members.

It is, of course, obvious that neither other provisions of the by-laws on other subjects nor any practices that might have been followed can be substituted for the unambiguous by-law provision imposing the tonnage assessment on all members.

Never since the inception of appellee has anyone heretofore questioned its power to levy and collect the tonnage assessment on voting and associate members alike. Appellant now asserts, contrary to the fact, that the practical construction given to the by-laws requires an interpretation that associate members are not subject to the tonnage assessment. In making this assertion appellant ignores the undisputed testimony that in adopting the tonnage assessment method in the by-laws it was intended as a charge against all members loading or discharging vessels and was not limited to voting members and applied to all types of members, steamship companies, terminal operators and stevedores (R. 377), and that all types of members have paid the tonnage assessment from the beginning (Finding 19, R. 41, 378). Appellant's assertion ignores the undisputed testimony and the findings of the trial court:

"From the organization of plaintiff its members have loaded cargo upon or discharged from vessels for various agencies of the government, including the Army and the Navy and the member so loading or discharging this cargo has reported the tonnage and paid the tonnage assessment thereon. In 1940 defendant commenced to load and discharge cargo for the Army and reported the tonnage and paid the tonnage assessment thereon without questioning its obligation so to do. * * *." (Finding 10, R. 38, 39)

"The defendant has at all times recognized and never questioned its obligation to report the tonnage of cargo loaded upon or discharged from vessels by it for the United States acting through the agency of the War Shipping Administration

and has paid the tonnage assessments thereon to plaintiff, the last payment thereon being (first) made after the commencement of this action.” (Finding 14, R. 40)

“All members of the plaintiff and of the Port Associations which are members of plaintiff, have paid all the tonnage assessments on all cargo loaded on or discharged from vessels by them, including cargo loaded or discharged for government agencies, including the Army, with the exception of defendant and two much smaller delinquents in smaller out ports.” (Finding 19, R. 41, 42)

Such payments by appellant and other associate members is scarcely compatible with the assertion that the practical construction has been that associate members are not subject to the tonnage assessment.

Appellant asserts that prior to 1940 the resolutions of the Board of Directors simply levied the tonnage assessment “without stating what class of member is liable” (Br. 38). As has been heretofore pointed out, the by-laws specify the method of assessment and who is to pay it, there remaining only for the Board of Directors in levying the assessment to determine the amount to be paid per ton of cargo. This was the method pursued by the Board of Directors (Ex. 3A, R. 95; Ex. 5, R. 96; Ex. 7, R. 99).

Appellant again refers to the agreement initiated by the stevedores whereby they obligated themselves to collect the tonnage assessment from non-member steamship companies (Ex. 10, R. 105) and inquires as to why this was necessary if they were already ob-

ligated to pay the tonnage assessment (Br. 39). This agreement was the result of the original recommendation of stevedores made on February 15, 1940 (Ex. D, R. 197) and adopted by the Board of Directors (Ex. E, R. 199) that "contracting stevedores and steamship lines," namely both voting and associate members, should either collect the tonnage assessment from non-members for whom stevedoring operations were performed or a man-hour charge subject to agreement being reached with the Union. This procedure was never put into effect and was subsequently rescinded (Ex. 9, R. 101, 556, 557, 558). It appears from the testimony that the stevedores wanted to be certain that when they were engaged in loading or discharging cargo for non-members, that their tonnage assessment obligation would be assumed by the non-member in the stevedore contract "largely as a matter of being certain that there would not be unfair competition between stevedores in manipulating cargo handling rates" (R. 378).

On May 8, 1940 (Ex. 8, R. 100, 267, 268) the Board of Directors appointed a committee, including stevedores, to further deal with this subject and adopted a resolution (Ex. 9, R. 101, 268) providing that the final report of this committee would stand approved when consented to by the stevedore members. The final report of the committee was the agreement to which appellant refers as the "special 'collect and remit' agreement of May 9, 1940" (Br. 39, Ex. 10, R. 105) and which rescinded the action taken on February 15, 1940, on the same subject. This agreement was subsequently signed by all stevedores, including

appellant (R. 107, 506, 507). It provides that the stevedores shall collect the tonnage assessment from non-members and remit to appellee and further provides for the insertion of a clause in the stevedoring contract with non-members whereby the non-member "agrees to reimburse the stevedore" for the tonnage assessment. It further provides that appellee "will consider relieving member stevedores from payment of tonnage assessments for non-member lines upon written statement of the facts that they have tried but failed to collect under the foregoing contract provisions." Where a member stevedore loads or discharges cargo for a member steamship company, arrangements were and are still common between them whereby one or the other reports and pays the tonnage assessment (R. 379, 380, 430-433, 500, 555, 556). In view of the fact that the member steamship company ultimately bears the cost of the tonnage assessment, the agreement further provides for this situation by relieving the stevedores of responsibility in such instances (R. 379). This agreement is not the basis of, but is a recognition of, the liability of associate member stevedores for the tonnage assessment. The basis of that liability for both voting and associate members is the by-law provision providing for the tonnage assessment. This is a special agreement among stevedore members only for the primary purpose of meeting their wishes in connection with an attempt to establish a uniform practice among them when loading or discharging cargo for non-members.

As late as May 26, 1943, appellant as a party to a report (Ex. 32, R. 134) adopted by the Board of

Directors (Ex. 33, R. 139) agreed that "all members * * * will continue to be directly responsible for the tonnage assessment * * *" (*infra* p. 64).

There is nothing in the by-laws nor in their practical interpretation which modifies in the slightest degree the unambiguous by-law provision imposing the tonnage assessment on all members.

Even if the by-laws of appellee did not contain the provision for the assessment to be levied against members, the power to make such assessment would nevertheless exist under the general powers granted to appellee in its articles and by-laws. It is provided in the articles that appellee has power:

"To do all other acts necessary or expedient for the administration of the affairs of the corporation and/or the attainment of any of the objects or purposes hereinbefore specified." (Art. II, 9(f), R. 53)

It is provided in the by-laws that the Board of Directors is empowered:

"To conduct, manage, and control the affairs and business of the corporation, and to make such regulations therefor, not inconsistent with law and these by-laws, as they may deem best." (Art. IV(b), R. 58)

There necessarily follows the power to raise funds for its support and the corresponding obligation on members to comply with action taken to that end as long as they remain members.

In *Omaha Law Library Ass'n. v. Connell*, 55 Neb. 396, 75 N.W. 837, 838, the liability of a member of a non-profit stock company for payment of dues was

upheld, although no provision of the statute under which it was incorporated, nor its articles provided for the payment of dues. The court holding that there was implied authority therefor, stated:

“* * *. * * * it is organized for the purpose of establishing and maintaining a law library for the use of its stockholders. It must have been apparent * * * that after it was organized certain current expenses would have to be met. * * * we think the promoters of this corporation by its articles of association, authorized its board of directors to enact just such a by-law as the one in controversy, namely, one to meet the current expenses of maintaining the library. The by-law, then, is not inconsistent with the law authorizing the creation of the corporation, nor is it inconsistent with the corporation charter.”

“* * *. The by-law imposes the annual dues upon the stockholder, and so long as he is a stockholder he is liable for the dues, whether he uses the library or not.”

The Resolutions of Appellee's Board of Directors Levying the Tonnage Assessment Are Not Invalid Because Not Authorized by Vote of the Membership.

Appellant specifies as error that the trial court erred in finding that appellee levied the tonnage assessment pursuant to the by-laws and in not finding to the contrary (Br. 7, 42).

The trial court found:

“Pursuant to the By-Laws of the plaintiff its Board of Directors duly levied and assessed against the member(s) of the plaintiff a tonnage assessment which is now and at all times since

before 1940 has been in full force and effect, to-wit: 2½ cents per manifest ton, on all off-shore and intercoastal cargo handled by members loaded upon or discharged from vessels, including such cargo handled for non-members, payable at the end of each month.” (Finding 7, R. 38)

Appellant’s argument, unsupported by the citation of any authority, is that the power granted to the Board of Directors to levy assessments is rendered ineffective by the limitation that it “shall not have the power to levy * * * or collect * * * assessments in excess of the maximum rate to be fixed” by vote of the membership (Art. IV(f), R. 59).

It is not contended that the tonnage assessment rate is in excess of a maximum rate so fixed, but it is merely contended that no maximum rate has been fixed. Under these circumstances it appears obvious that the rate fixed by the Board of Directors for the tonnage assessment is not in violation of any restriction imposed by the membership. If the contention here presented is available, it is without merit.

The present rate was first established by a resolution of May 11, 1938 (Ex. 5, R. 96), which appellant admitted was duly adopted (R. 260, 261) and of which appellant received notice on or about May 20, 1938 (Ex. 6, R. 98, 264, 265). In view of the fact that the resolution was admittedly duly adopted and in view of the fact that no foundation was laid in the pleadings for the defense now presented, appellee objected to any testimony on the issue (R. 540). By way of offer of proof only (R. 548) it appears that the original rate was ratified by the membership, both

voting and associate (R. 549), but that no similar action by the membership was subsequently taken in connection with the increase (R. 550). The resolution of February 14, 1940 (Ex. 7, R. 99) recites that the resolution of July 31, 1937, was confirmed in writing by the membership.

In addition, it is to be remembered that the increased rate has been in effect since 1938 and has been and is being paid by all members, including appellant. No member, including appellant, may at this late date successfully attack the rate of assessment. The continued acquiescence therein clearly creates an estoppel to raise the point now presented by the defendant as an after-thought. *Gowans v. Rockport Irr. Co.*, 77 Utah 198, 293 Pac. 4, 7.

Appellee Has Levied the Tonnage Assessment Against All Members, Voting and Associate, Including Appellant.

Appellant specifies as error the failure of the trial court to find that no resolution levying the tonnage assessment has ever been adopted applicable to an associate member (Br. 7, 43).

Appellant's contention is that the resolutions of the Board of Directors do not contain a direct levy on appellant or any other associate members, but seek to accomplish this result as to associate members by referring back to the special agreement of May 9, 1940 (Ex. 10, R. 105), which appellant asserts cannot be applied to Army cargo.

At the expense of repetition it is again pointed out

that the by-laws provide the method of assessment and who is to pay it. The Board of Directors in levying the assessment is to determine the amount or rate to be paid per ton of cargo. In accordance with this provision of the by-laws by resolution of July 31, 1937 (Ex. 3A, R. 95, 529, 530) the Board of Directors levied the tonnage assessment and fixed the rate thereof which, as the by-laws provide, is payable "by each member." The consistent practice under this provision of the by-laws has been for both voting and associate members, including appellant, to pay the tonnage assessment (R. 377-381, 430-433, 436, 473, 478-481, 487-500, 518, 555, 556, 585, 587; Ex. 45, R. 509-512).

The resolution of May 11, 1938 (Ex. 5, R. 97) merely increases the rate for the tonnage assessment provided in the by-laws and provides for notice "to members of the increase in assessment rates," which appellant received on or about May 20, 1938 (Ex. 6, R. 98, 264, 265). The resolution of February 14, 1940 (Ex. 7, R. 99) reaffirms the increase. The resolution of February 15, 1940 (Exs. D, E, R. 197-199) requires no further comment, as heretofore pointed out it was rescinded and never acted upon (R. 557, 558). The resolution of May 8, 1940, and attached agreement of May 9, 1940 (Ex. 9, R. 101; Ex. 10, R. 105) has heretofore been discussed.

Appellant fails to refer to the resolution of August 14, 1940 (Ex. 12, R. 108) which of course is accounted for by the fact that it does not conform to appellant's present argument. By this resolution "acceptance of responsibility for non-member tonnage assess-

ments" was made a condition of membership for all contracting stevedores and notice of this action (Ex. 13, R. 109) was received by appellant on or about August 17, 1940 (R. 273, 274). It is, of course, obvious that the Army is a non-member and that appellant clearly understood and assumed its obligation to pay the tonnage assessment on cargo loaded or discharged for the Army (R. 600, 601).

If there could have been any doubt, this would have been removed by the resolution of March 12, 1941 (Ex. 14, R. 110, 274, 286, 287) wherein it is specifically stated that the obligation applies to cargo loaded or discharged for the Army. The obvious purpose of this resolution was to reaffirm the understanding always theretofore in effect that Army cargo was non-member tonnage (R. 500). Appellant commenced loading and discharging Army cargo in 1940 and had been reporting and paying the tonnage assessment thereon without question (Ex. 20, R. 121, 283, 510, 511, 512; Ex. 45, R. 509). This was followed by a similar resolution of April 16, 1942 (Ex. 15, R. 111, 275) requesting regular reporting on Army cargo by all members, including stevedores, of which resolution appellant received notice on or about April 27, 1942 (Ex. 16, R. 112, 276). Finally, on June 25, 1942, a resolution was adopted:

"* * * that the contracting stevedores or the steamship companies doing stevedoring of cargo for either the Army, Navy or W S A is obligated to report the tonnage so handled and pay the assessment to the Association in the same manner that non-member tonnage has been reported to the Association; and

“* * * the Board reaffirms the base rate of assessment as 2½c per ton now in force on commercial cargo.” (Ex. 17, R. 115, 279)

of which appellant received notice on or about July 1, 1942 (Ex. 18, R. 116, 280). Non-member tonnage was reported on the regular reporting form (Ex. 4, R. 508).

It is difficult in view of the foregoing to see how appellant seeks to successfully maintain its position that no resolution levying the tonnage assessment against any associate member has ever been adopted.

The Tonnage Assessment Is Not Based Upon Threatened Duress and Therefore Invalid.

Appellant specifies as error the failure of the trial court to find that the tonnage assessment is unenforceable because based on duress consisting of threats of economic reprisals (Br. 7, 45).

Appellant concedes that it could have resigned and therefore have avoided the tonnage assessment (Br. 45), but asserts that it was not required to do so to remain free of payment because, first, it could remain a member and insist upon appellee adopting a lawful dues program and policy, and second, as a non-member the cost to it of securing longshoremen from the jointly maintained hiring halls would exceed the tonnage assessment.

The first contention is obviously unsound, as by continued membership appellant remains contractually obligated for the tonnage assessment (*supra* p. 42).

The second contention is equally without merit. As

heretofore explained, the hiring halls from which longshoremen are obtained by appellant and other members of appellee are maintained at the joint expense of appellee and the Union. Non-members of appellee are assessed a charge for obtaining men from the hiring halls as an equitable reimbursement to appellee of its portion of the cost of maintaining the hiring halls (R. 360). This charge is on a man-hour basis and was originally 2½c (Ex. 3A, R. 95) and was raised to 4c at the request of stevedore members (Ex. 11, R. 108, 272, 360, 426). Such a charge was in effect in the Washington Association before the hiring halls were taken over by appellee (R. 360, 361). Inasmuch as one of appellant's contentions is that the support of appellee should not be limited to the tonnage assessment, it seems rather inconsistent to also contend that non-members securing longshoremen from the hiring halls should not be required to equitably reimburse appellee for its costs in maintaining the hiring halls.

The proposal of the stevedore members, adopted by the Board of Directors on February 15, 1940 (Exs. D, E, R. 197, 199) that agreement be reached with the Union that men should not be furnished from the hiring halls to non-members who refused to pay the non-member assessment was, as previously indicated, subsequently rescinded and never put into effect.

Appellant asserts that there are threats of economic compulsion contained or inherent in certain action taken by appellee in connection with appellant's delinquency by a resolution of February 25, 1943 (Ex. 23, R. 125). By this resolution it was recited that

appellant had refused to pay the tonnage assessment and that suit would be instituted after first giving appellant advance notice. It was further provided that a committee representing appellee should meet with the Washington Association and enlist its support in an effort to resolve this situation and to meet with appellant to effect a method of payment, with authority to agree to any reasonable basis of deferred payments. The concluding portion of the resolution, to which appellant refers, provides that San Francisco members having agents in Seattle should advise them and instruct those who are members of the Board of Trustees of the Washington Association to vote to support the action of appellee. ,

It is apparently appellant's contention that because appellee thus sought the aid and assistance of the Washington Association in resolving the situation brought about by appellant's failure to pay the tonnage assessment, therefore appellant should be relieved of the tonnage assessment. The Washington Association is an associate member of appellee and appellant is both a member of appellee and of the Washington Association. No authorities are submitted in support of this rather remarkable contention and it is obviously without merit.

Appellant as a non-member cannot properly expect to use the facilities of the joint hiring halls in securing longshoremen without payment of an equitable charge for that service. It is not contended that the man-hour charge is inequitable or excessive. Appellant contends first, that as a member it is not obligated to pay the tonnage assessment for appellee's

support, and second, that as a non-member it should not be obligated to pay the man-hour charge. Taken together, the position is that the industry represented by appellee should provide all its services to appellant free of charge. It is, of course, obvious that this fails to make sense, for if appellant is so entitled so are all members, and non-members, in which event appellee would cease to exist.

There is no merit in nor evidence in support of the contention that the tonnage assessment is based on duress consisting of threats of economic reprisals.

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Appellant In Addition to Its Contractual Obligation Under the By-Laws, Further Agreed In Writing on March 11, 1943, to Pay the Tonnage Assessment.

Appellant specifies as error the failure of the trial court to find that appellant at no time contracted to pay the tonnage assessment on Army cargo (Br. 7, 48).

The trial court found:

“On March 11, 1943, the plaintiff accepted from the defendant a letter signed on its behalf by its secretary-treasurer, director and attorney, reading as follows:

“‘This is to advise you that on the tonnage handled by us for the U. S. Army up until January 31, 1943, upon which no tonnage assessment has been paid, we will pay the Waterfront Employers Association of the Pacific Coast the tonnage assessment of 2½c per ton on a volume tonnage to be determined; payment to be made in approximately equal installments of thirty, sixty and ninety days from this date.

“‘Also from February 1, 1943 onward, we will pay the tonnage assessments currently at the rate set by the Coast Association.’” (Finding 12, R. 39, 40)

“Following the delivery of said letter on March 11, 1943, defendants paid to plaintiff in installments the tonnage assessments due for the period ending December 31, 1942, on cargo so loaded or discharged by it for the Army, the last payment being made on November 23, 1943.” (Finding 13, R. 40)

Appellant specifies no error in the making of these findings.

In addition to appellant's contractual obligations as fixed by the articles and by-laws, recognized by the special agreement among stevedore members (Ex. 10, R. 105), and affirmed by its continued membership, appellant by this letter accepted by appellee on March 11, 1943, has expressly promised to pay specifically and in detail the very tonnage assessment for which this action is being brought.

Appellant on its own admission recognizes a “moral obligation” for payment of the tonnage assessment (Br. 49). By this promise appellant agreed to pay the tonnage assessment on cargo handled by it for the Army up until January 31, 1943, in installments, and thereafter currently at the rate set by appellee. Appellant has met this promise to the extent of the tonnage assessment due for the period up to and including December 31, 1942, but has failed to keep its promise to pay the tonnage assessment thereafter.

A moral obligation is sufficient under such circum-

stances to support a subsequent promise to pay. *Irons Investment Co. v. Richards*, 184 Wash. 118, 50 P. (2d) 42, 44; *Opitz v. Hayden*, 17 Wn.(2d) 347, 135 P.(2d) 819, 827. It is clear from the statement of the law in the latter case that a moral obligation, accompanied by material benefits to the promissor will support a promise to pay. Such is the situation in reference to appellant's promise and its liability for the tonnage assessment may be predicated solely thereon. The court in the latter case refers to 17 A.L.R. 1229, 1366, wherein it is stated:

“* * * the moral obligation arising from a benefit of a material or pecuniary kind conferred upon the promissor by past services, rendered in the expectation that they were to be paid for—or, at least, if rendered upon the assumption by the person rendering them, though mistaken, that they would create a real liability—and, otherwise, in circumstances creating a moral obligation on the part of the promissor to pay for the same, will support an executory promise to do so, although there was, previous to such promise, no legal liability or promise, perfect or imperfect.”

If appellant was not at the time of the making of the promise, nor subsequently, otherwise legally bound to pay the tonnage assessment, it is bound on its promise based on a moral obligation accompanied by material benefits. The promise is further supported by a further ratification (Exs. 32, 33; R. 134, 139) and by continuous consideration moving to appellant from appellee in view of appellant's election to continue as a member and to accept the continued benefits of such membership. The promise is further supported by the

consideration resulting from appellee accepting such promise and not expelling appellant, which right appellee had at the time the promise was made.

The circumstances surrounding the making of this promise are as follows: Due to the failure of appellant to pay the tonnage assessment it was notified that a meeting of the Board of Directors would be held on November 11, 1942 (Ex. 19, R. 118). In response to this notification appellant did not state that it did not consider itself liable for the tonnage assessment which it had not paid, but merely stated that "this charge has been held in abeyance" (Ex. 20, R. 121). As a result of this meeting the Board of Directors ordered that all delinquencies covering tonnage assessments, including for Army cargo, be paid up to date and that a committee be appointed to consider whether there should be a change in the assessment program (Ex. 21, R. 122). The committee was appointed and by its report, which was approved by the Board of Directors on November 12, 1942 (Ex. 22, R. 123) it was provided that the tonnage assessment remain for payment by the member loading or discharging the cargo and that members desiring a change in the assessment policy should forward their recommendations to the Board of Directors.

On November 24, 1942, the Washington Association recommended to the stevedores in the Washington district that they work out a proposal for a change in the assessment policy (Exs. M, M1, R. 215) and on December 11, 1942, a committee of stevedores, including F. E. Settersten, President of appellant, herein called the "Seattle Committee," was appointed to pre-

pare such a proposal (Ex. N, R. 217). As a result of the resolution of February 25, 1943, authorizing institution of suit against appellant (Ex. 23, R. 125) a committee, herein called "Appellee's Committee," met with the Washington Association and appellant on March 10, 1943 (Ex. 24, R. 128, 287) resulting in an oral promise of appellant to pay the tonnage assessment (R. 288) followed by the written promise, accepted by appellee on March 11, 1943 (Ex. 25, R. 132).

Appellant has printed in the record letters (Exs. G, H, I, J, K, R. 201-212) which were not admitted in evidence, subsequently passing between Appellee's Committee and the Seattle Committee, which contained a variety of proposals for changes in the assessment policy. Finally on May 26, 1943, these committees met (M. J. Weber, Vice President of appellant substituting for F. E. Settersten, its President, on the Seattle Committee) at which meeting a joint proposal in the form of a report (Ex. 32, R. 134, 366, 367) was prepared and subsequently submitted to and adopted by the Board of Directors on May 27, 1943 (Ex. 33, R. 139). In this report, adopted with the approval of said M. J. Weber, representing appellant (R. 367, 461, 475) the first item of agreement was as follows:

"All members of the Coast Association who are employers of longshore labor will continue to be directly responsible for the tonnage assessment as set by the Coast Association." (Ex. 32, R. 134, 137)

This was a clear recognition by appellant of its obli-

gation to pay the tonnage assessment and a reaffirmation of its promise to pay the same.

The report further contained a proposal for further consideration of changes in the assessment program of appellee concerning which no conclusions were ever thereafter reached (R. 369, 375, 376, 615).

Appellant asserts that "it is unthinkable" that appellant would agree that its liability for the tonnage assessment would rest on a special contract while other members would be liable under the by-laws only (Br. 49). Of course the liability of all members results from the by-laws providing for the tonnage assessment and appellant's special agreement of March 11, 1943 (Ex. 25, R. 132) is but a further and independent contract to the same effect. This independent contract, even if it exceeded the contractual obligation of the by-laws would nevertheless be enforceable.

In *Ford v. Peninsula Light Co.*, 164 Wash. 599, 4 P.(2d) 504, 505, 506, a non-profit corporation organized to transmit electrical energy to its members, had a by-law provision providing for reimbursement of members for the cost of transmission lines built by them. The plaintiff member as a condition of membership waived the benefit of this provision and in seeking such reimbursement relied on the by-law provision. The court recognized the rule "that the by-laws constitute a contract between the stockholder and the corporation," but held:

"The price to appellant of membership * * * was a specific oral agreement at variance with the provisions of the by-laws * * *. It was not

an illegal condition precedent to membership on the part of respondent, and appellant is bound by his acceptance."

CONCLUSION

It is undisputed that appellant along with others engaged in the shipping industry, requiring coordinated effort in dealing with labor problems, including the establishing, maintaining and administration of hiring halls, organized appellee for that purpose. Appellant has been one of the most substantial beneficiaries of this coordinated effort.

It is further undisputed that the tonnage assessment used for appellee's support is a just and reasonable amount and commensurate with the value of its services to appellant. It is further undisputed that these services were needed by appellant to perform its contracts with the Army and if not furnished by appellee the appellant "would have needed to have furnished them itself at a much greater cost * * * than the assessments levied and charged * * *" (Finding 15, R. 40).

Appellant's position, aside from criticism of the by-laws, the adoption of which it approved, is that as a member it is entitled to receive and benefit by the services of appellee at the expense of its fellow members. There is no justification in morals for such a position and appellant's alleged legal defenses in support of such a position are without merit.

It is submitted that none of the errors specified by

appellant are well taken, that the trial court's findings and conclusions are in all respects without error, and that the judgment appealed from should be affirmed.

Respectfully submitted,

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRIFFITHS AND SPRAGUE STEVEDORING
COMPANY, INCORPORATED, a corpora-
tion,

Appellant,

vs.

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST, a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

REPLY BRIEF

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FILED

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No. 11437

UPON APPEAL FROM THE DISTRICT COURT OF THE
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WASHINGTON, NORTHERN DIVISION

REPLY BRIEF

It is not appellant's purpose, in submitting this reply brief, to subject this court to a re-argument of the propositions which have already been fully stated in appellant's opening brief. It would not be proper to do so nor is such a course necessary. The irreconcilable contentions of the parties are squarely presented by their respective briefs already filed. The function of this reply brief will therefore be strictly limited to pointing out in the briefest manner possible certain fallacies in appellee's argument.

I.

The Fact That the Appellant May Have Received Substantial Benefits From Its Membership In the Appellee Corporation Has No Bearing On Any Question Here Involved.

Throughout its brief, the appellee repeatedly recurs to the proposition that appellant has received benefits from its membership in the appellee corporation and that it should, therefore, be obligated to pay the tonnage assessment. In this connection, appellee refers to a finding of the trial court that appellant would have been required to procure services of the character furnished by appellee, if appellant had not been a member of appellee, and that the expense to appellant in such case would have exceeded the amount of tonnage taxes which appellee seeks to collect (Finding No. 15, Tr. 40).

There is actually nothing in the record which shows in detail what it would probably cost appellant to provide itself with services such as those provided by appellee. It is apparent that a detailed inquiry into this subject would have been time consuming and to a large extent speculative. Appellant believes that in the present state of the record there is no real basis for such a positive finding of fact, but even if the finding is assumed, for the sake of argument, to be correct, the fact is so obviously immaterial as to render it of no moment whatsoever.

It is sought in this case to hold appellant for dues which are claimed to be owing from appellant by virtue of its membership in the appellee corporation. The ultimate question is whether appellant, by becoming

a member, assumed a status which subjected it to liability on account of the particular dues here involved. If so, appellant is liable without regard to the quantum of actual benefit received by it; if not, appellant is not liable even though it has benefited far beyond its expectations. To illustrate, take the case of a private club which has by-laws entitling its members to certain privileges upon the payment of fixed dues, of say, \$10.00 a month. The by-laws having fixed the rights of the parties, it obviously is impossible for the club to disregard its by-laws and to evolve some other basis for dues and to justify its conduct in doing so by stating that the member has received benefits which exceed in value the amount sought to be collected from him. This would be nothing else than an attempt to vary the express contract of the parties by unilateral action.

As a member of appellee, the appellant has the right to insist that the appellee corporation operate in accordance with the full agreement of the parties. This agreement is contained in the articles of incorporation and the by-laws, as affected by the California statutes under which those articles and by-laws were adopted and by the requirements of public policy applicable thereto. No matter how much benefit appellant may have received, its liability cannot exceed what, if anything, it agreed to pay for those benefits. Appellee cannot enforce a dues program which either violates its by-laws, the California statutes or rules of public policy simply by saying that its charges are less in amount than the value of the benefits conferred. It must rather confine its dues program to

some course which meets its agreement and is not condemned by law.

We recognize, of course, that appellee denies that it has violated its agreement and the law applicable thereto, and, insofar as appellee confines itself to such denials, it addresses itself to the issues in this case. But when the appellee goes further, as it has done repeatedly in its brief, and challenges, upon the benefits received theory, appellant's rights to insist, as a member, that appellee conduct its business in accordance with law, then appellee assumes an utterly untenable position. It is too manifest for argument that this contention, if allowable, would permit the appellee to enforce almost any claim against appellant without regard to legal restrictions.

II.

The Fact That Appellant Has Paid Certain Amounts On Account of the Tonnage Taxes Has No Bearing On the Decision of This Case.

Another favorite statement of appellee is that appellant has, in some way, lost its right to challenge the legality of the appellee's dues program because appellant has paid some of these dues.

With respect to appellant's proposition that the appellee's dues program violates public policy, there can be no dispute that appellant's acquiescence is without effect. Partial or past performance of a contract which is contrary to public policy cannot so validate the contract as to justify a court in enforcing further performance.

Independent of the public policy question, it will be

recalled that in our opening brief we pointed out that in part, at least, appellant has been threatened with economic reprisals if it should fail to comply with appellee's demands. Payments made under these circumstances cannot prejudice appellant's position.

In addition to these specific features of payments made by appellant, it suffices to say that appellant has at no stage admitted its liability to pay the tonnage tax on Army cargo. The dispute on this point between appellant and appellee runs back to 1942 when Army cargoes first began to play a prominent part in appellant's business (Plf.'s Exhibits 19, 20, 22, Tr. 118, 121, 123). Appellant is thus entitled to challenge the validity of any claim for amounts yet unpaid.

III.

The Public Policy Argument

The arguments of the respective parties to this appeal upon the question of whether the appellee's dues program violates public policy simply represent two entirely different views of the law as announced by certain authorities common to both of the earlier briefs. It is for the court to determine which interpretation is correct upon its own examination of the decision. Any further argument by appellant as to the content of the cases would only be repetitive and burdensome to the court.

Appellee does, however, argue that the cases relied upon by appellant lose force because the Army contracts in the case at bar were negotiated contracts under the First War Powers Act, rather than contracts obtained on competitive bidding, and because

such contracts were subject to renegotiation by the government. This argument lacks validity for at least two reasons. First, the rules of the cases relied upon by appellant are not by their nature confined to contracts obtained on competitive bids. The competitive bidding device is used on public contracts for the obvious purpose of protecting the public interest. When, owing to the exigencies of war, it was necessary to let down the bars on the making of public contracts, the government substituted the device of renegotiation to protect the public interest. If it be assumed, as it must be under the authorities, that the courts are bound to give further protection to contracts obtained by competitive bidding in times of peace by refusing to enforce transactions which tend illegally to add to the cost of contracts so obtained, it must be equally true that the courts will do the same thing where the legislature in time of war has been compelled to introduce a substitute safeguard. The inherent principle of the cases is that the existence of legislative statutory safeguards does not end the matter but that the courts, under established principles of the common law, will further discourage raids upon the public treasury by refusing to enforce collateral arrangements of private parties which add to the cost of public contracts.

Second, if the factor of competitive bidding really were of any consequence, it does appear from the uncontradicted testimony that competitive bids were made as a basis for the so-called "negotiated contracts" between appellant and the Army (Tr. 596, 597).

IV.

The Lack of Uniformity Argument

In answering appellant's argument upon the proposition that the tonnage tax is not uniform as required by California statute, the appellee argues at some length by analogy to tax cases. No such analogy can be legitimately made. The status of members of a non-profit corporation like that of stockholders in a business corporation is determined by the structure of the corporation and by what the authorizing statute permits. The Articles and by-laws, to the extent permitted by statute, constitute a contract between the members of a non-profit corporation. Tax laws, on the other hand, rest on no element of contract but upon legal and historical bases utterly different from laws affecting corporations. This distinction is too obvious and elementary to require exposition. Any effort to determine the contractual rights of a member or shareholder of a corporation by comparing his status to that existing between a taxpayer and the sovereign can lead only to confusion.

The basis for appellant's argument upon want of uniformity is the California statute, which appellee largely ignores. We think it manifest that the dues program violates the requirements of that statute for the reasons already fully stated in our opening brief.

V.

**Do the By-Laws Permit Any Form of Dues to Be Levied
Against Associate Members?**

In answer to appellant's argument that the by-laws do not permit imposition of any dues upon asso-

ciate members, the appellee says that the particular by-laws which concern dues are unambiguous and that other portions of the by-laws and the practical interpretation of the parties cannot be looked to for purposes of construction. If the by-laws specifically pertaining to dues were unambiguous in their terms, we would certainly agree with the appellee's contention. As pointed out in our opening brief, ambiguity is the rule rather than the exception in all of the acts of the appellee corporation, and this statement is most demonstrably true as to the by-laws which pertain to dues.

Take Article XVI (Tr. 72) of the by-laws quoted by appellee in its brief as an example. It reads in part thus:

“In fixing all dues and levying all assessments, the Board of Directors shall determine the amount to be paid by each member per ton of cargo loaded and/or discharged at each United States Pacific Coast port (except Alaska ports)
* * *”

Can anyone possibly say, in light of all the facts of this case, what that provision means without resort to extrinsic evidence which will permit some interpolation of additional language?

As the language stands, it can be argued that each member can be called upon to pay some stated amount multiplied by the total cargo passing through all the ports of the Pacific Coast, even though such member had nothing whatsoever to do with such cargo. Neither party contends that this literal interpretation of the language has ever been employed. The appellee's posi-

tion in this case requires that the words "by such member" or their equivalent be read into the clause following the words "loaded and/or discharged." The appellee's assertion that the clause is unambiguous is thus refuted by the necessities of its own position.

But if we go along with appellee and aid its "unambiguous" by-law by inserting words which give it a meaning more nearly approaching appellee's theories, we simply develop a secondary ambiguity. What do the words "loaded and/or discharged by such member" mean when applied to the case where the vessel belongs to a voting member and the work is being done by an associate voting member. The appellee's president, Mr. Foisie, recognizes that the owner voting member in such case would say that it was "loading or discharging cargo" and that the associate member would say the same thing (Tr. 429, 430). Are both then to pay the tax under this "unambiguous" by-law which we have already assisted by the addition of clarifying words? Not so, says the resourceful Mr. Foisie. The tax is to be paid but once by one or the other of the parties as they shall agree between themselves (Tr. 431, 432). So now we must give this crystal clear "unambiguous" by-law a little more help and add some more words such as the following: "Provided, that where a vessel owned or operated by a voting member steamship company is loaded by an associate member stevedoring company the assessment shall be payable but once and by such of the two members as they shall mutually agree."

But when we have done this to the "unambiguous" by-law, what happens if neither member pays? Do we

now have a joint and several liability or what? The record does not give any explanation of this problem, but appellee asserts that the by-law is "unambiguous" and needs no aid by way of interpretation.

The ambiguity of the by-laws with respect to dues are thus so patent as to leave no alternative to a resort to external evidence, including the remaining by-law provisions and the practical interpretations given thereto. As developed in our opening brief, the by-law provisions on dues were clearly interpreted by the parties so as to impose dues liability on voting members only. Only by a special written consent incident to the May 9, 1940, resolution (Tr. 101 to 103) were associate members made liable, and then only as to cargo handled for "non-member steamship companies," a category that cannot be stretched to include the Army.

To avoid repetition, we refer to pages 36 to 42 of appellant's opening brief, where the argument upon construction of the by-laws is fully developed.

VI.

**The Resolutions Levying the Tonnage Tax Have Never
Been Approved By the Members**

In answering appellant's argument that Article IV, subsection (f) of the by-laws (Tr. 59) requires that the members "at a regular or special meeting" fix a maximum rate as a condition precedent to any levy of dues by appellee's directors, appellee states, among other things, that the first resolution levying dues was "confirmed in writing by the membership." Not only was this confirmation applicable to the then rate of two cents per ton, but admittedly no vote called for by the by-law was taken at "a regular or special meeting." There has thus been no compliance with the by-law. It is a fundamental principle of the law of corporations that action required to be taken at a corporate meeting cannot be accomplished by independent individual action of the members when not in meeting assembled.

Appellee also seeks to go back to the point made by it at the trial that appellant cannot raise this point because, in response to a request for admission, appellant admitted that the various tonnage tax resolutions were "duly adopted" (Tr. 13 to 20). But in the language of appellee's own complaint, it is alleged that the tonnage taxes were duly levied and assessed "pursuant to the by-laws" (Tr. 3). The appellant has never admitted adoption in accordance with the by-laws, the "duly adopted" admission having reference obviously to the counterpart of that phrase as used in appellee's complaint. The deliberate omission to call for an admission of adoption *pursuant to the by-laws* clearly

must be interpreted to mean that appellant was not being asked to admit that the by-law requirements had been met, especially since appellant had by certain affirmative defenses set up non-compliance with the by-laws as a defense (Tr. 7, 8).

CONCLUSION

Appellant reserves for oral argument any phase of appellee's brief which has not been specifically dealt with herein.

Respectfully submitted,

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